IN THE

Supreme Court of the United States

No. 77-1073

LEE PHARMACEUTICALS,
Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,
Respondent.

DEN-MAT, INC., ROBERT IBSEN, W. RICHARD GLACE, FRED H. BROCK AND PROFESSIONAL PRODUCTS CO.,
Real Parties In Interest.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Lee Pharmaceuticals respectfully petitions this Court for a writ of certiorari to review an order of the Court of Appeals for the Ninth Circuit, filed November 3, 1977.

OPINIONS BELOW

The Court of Appeals delivered no opinion. Its order, (App., p. 1a) is unreported. The bench opinion of the Honorable Martin Pence delivered September 14, 1977 (App., pp. 10a to 30a) is likewise unreported, as are the antecedent relevant orders of the Honorable Albert Stephens and Senior Judge Jesse W. Curtis (App., pp. 3a to 9a) and the subsequent formal order of Judge Pence, filed November 14, 1977 (App., 31a).

JURISDICTION

The order of the Court of Appeals was filed November 3, 1977. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. May the federal judiciary defy Congressional intent by construing the mandate of 28 U.S.C. 455(a), a remedial statute enacted in 1974 to improve public confidence in the judiciary by requiring a judge to disqualify himself whenever his "impartiality might reasonably be questioned", to render it (a) coextensive with the personal bias and prejudice disqualification provisions of 28 U.S.C. § 144 and 455(b)(1), and also by (b) arbitrarily imposing upon it the decisional shellac with which the lower federal courts effectively immobilized 28 U.S.C. § 144 for some fifty years?

2. Does the proper implementation of 28 U.S.C. 455 (a) require a consideration of all evidence germane to whether a judge's impartiality might reasonably be questioned, including, without limitation, psychiatric evidence?

3. Did Congress intend by 28 U.S.C. 455(a) to repudiate not only

(a) the judicially created principle that judges have an overweening "duty to sit" in assigned cases which compels a narrow construction of the ambit of disqualification statutes, but also

(b) other judicially fashioned strictures upon 28 U.S.C. 144 which have in the past led to the denial of disqualification motions premised on actual personal bias and prejudice, *inter alia*,

(i) if exhibited against counsel rather than a party,

(ii) if arising within the context of a case rather than outside its record, and

(iii) if manifested only by occurrences, such as expressions of pronounced unilateral judicial discourtesy and antipathy toward a party, on the record of pending litigation?

4. Is postponement of appellate review of an order denying judicial disqualification sought pursuant to 28 U.S.C. 455(a), until after the controversy in which the challenge arose has been fully determined with unfettered participation of the challenged judge, tantamount to denial of the challenging litigant's right to a fair trial before a tribunal that both *is, and appears to be*, completely fair and impartial?

5. Is a judge who demonstrates on the record of a case

(a) a callous insensitivity toward truth, ethics and simple fairness,

(b) an inability to behave in a calm, detached, impersonal and apparently impartial manner,

(c) a marked discourtesy, impatience, skepticism and rancor toward one party before him and its counsel, and

(d) a profound lack of respect for the established procedures and usages of law as set forth in federal and local rules,

all to the prejudice of only one party to a pending case and the advantage of its opponent, obligated to disqualify himself under 28 U.S.C. 455(a) when challenged?

6. Does a federal judge *per se* create a reasonable question as to his own impartiality by not only authorizing *ex parte* discussion between his law clerk and one of the parties to litigation pending before him concerning a matter in controversy, but severely castigating the op-

posing party and its counsel for filing a motion to obtain full disclosure of the particulars of all such *ex parte* contacts and dismissing their motion as moot in view of certain self-serving, uninformative affidavits given by his law and docket clerks?

STATUTES INVOLVED

28 U.S.C. §§ 455(a) and (b)(1):

> "§ 455. Disqualification of justice, judge, magistrate, or referee in bankruptcy
>
> (a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; . . .".

28 U.S.C. § 144:

> "§ 144. Bias or prejudice of judge.
>
> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within

> such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

STATEMENT OF THE CASE

Petitioner is the plaintiff in an action, No. 75-2311, pending before Senior Judge Jesse W. Curtis of the respondent United States District Court for the Central District of California, wherein the second amended complaint seeks damages and injunctive relief for defendants' misappropriation of trade secrets, infringement of three patents and five trademarks and other acts of unfair competition. In lengthy answers the various defendants deny the allegations of this complaint and in also lengthy counterclaims, two defendants seek damages for alleged federal and state antitrust law violations, false patent marking and unfair competition.

Commencing on October 27, 1976, the district judge entered a series of largely *sua sponte* orders of an unprecedented character, whereby admittedly "unusual and innovative procedures" were substituted for those defined in the Federal Rules of Civil Procedure, to petitioner's prejudice and defendants' advantage. These procedures included, by way of nonlimiting example, all of the following:

> (i) the *sua sponte* subordination, without notice or opportunity to be heard and without any change in circumstances, of petitioner's pending preliminary injunction application re trade secret, trademark and related unfair competition issues to an early and separate trial on the issue of patent validity, even though (a) there had to that point been no discovery on patent validity and (b) this subordination was contrary to earlier orders representing the established law of the case,

(ii) the *sua sponte* announcement—subsequently slightly modified but never wholly rescinded and also without notice or opportunity to be heard—that the issue of patent validity would be tried solely to the court, an edict in the teeth of jury trial demands from both sides,

(iii) a refusal to permit petitioner to discover any information relevant to patent validity and favorable to the patents, that might be in defendants' custody, control or possession,

(iv) a refusal to permit petitioner to obtain other discovery needed to rebut defendants' patent validity challenge and,

(v) the *sua sponte* edict, again without notice or opportunity to be heard, that in lieu of a judicial ruling on the merits of defendants' already pending Rule 37 motion re interrogatory and documentary discovery concerning trade secrets, trademarks, and related unfair competition, a master would be appointed to supervise the trade secret issues—this notwithstanding the absence of Rule 52(b) findings or facts on which they could be premised.[1]

Efforts to obtain reasoned reconsideration of the first wave of these unusual orders, including requests to be heard orally as to the inappropriate character of the various *sua sponte* judicial fiats, were unavailing. Also unavailing were efforts to obtain appellate review (1) under 28 U.S.C. 1292(a)(2) of the *de facto* denial of petitioner's preliminary injunction application, effected by inordinate and indefinite delay of hearing it,[2] and (2)

[1] The October 27, 1976 orders also resumed and perpetuated a discovery "freeze" precluding any party from taking discovery without prior leave of court which had first been imposed *sua sponte* in December 1975 but had been relaxed in May 1976 to permit defendants only to pursue unlimited discovery on trade secrets, trademarks and related unfair competition for a sixty day period.

[2] Despite contrary precedent from other circuits—e.g., *United States* v. *Lynd*, 301 F.2d 818 (5 Cir. 1962); *Dellinger* v. *Mitchell*, 442 F.2d 782 (D.C. Cir. 1971)—the Ninth Circuit dismissed the appeal on the ground that the orders which effected the *de facto* denial were nonappealable.

under 28 U.S.C. 1651, by supervisory mandamus, of Judge Curtis' curtailment of petitioner's jury trial and other rights to a fair trial and a fair opportunity to prepare for trial.[3]

During the course of these various efforts, however, it became plain to petitioner that:

a). Hand-in-hand with his abandonment of the prevailing federal and local civil procedural rules, Judge Curtis had also recklessly abandoned any effort to deal truthfully with the facts, as manifested by (i) his entry of various fact findings in formal court orders, to petitioner's detriment only, which were either contrary to or wholly unsupported by the facts of record and (ii) his subsequent adamant refusal to correct these erroneous fact findings when his attention was drawn to their inaccuracies.

b). With the authorization of Judge Curtis, his law clerk in December 1976 held at least one *ex parte* telephone conference with defendants' counsel concerning a matter in controversy between the parties. After this conference, a ruling adverse to petitioner was made.

c). Judge Curtis showed himself to be markedly reluctant to place on the record all the facts concerning *ex parte* contacts between his staff and the defendant, even to the point of launching a scathing and vituperative attack on petitioner and its counsel for their temerity in formally moving for such a disclosure. The motion was dismissed as "moot" in view of the self-serving affidavits of his own law and docket clerks, which do not even touch upon the detailed facts of what transpired in the

[3] The mandamus petitions were simply summarily denied, presumably under General Order 4 of the Ninth Circuit, App., pp. 70a-71a.

one *ex parte* conversation about a question in controversy that the law clerk confessedly had with defendants' counsel, and are in other respects less than a complete revelation of the information sought.

d). As particularly first revealed at the January 10, 1977 hearing, Judge Curtis has permitted himself to become emotionally embroiled in Civil Action 75-2311 to a point where he is regularly uncivil and discourteous to the petitioner and its counsel and appears unable to maintain the cool, calm and detached judicial mien that litigants have a right to expect from federal judges. At this hearing, Judge Curtis went so far as to fine petitioner's counsel in the arbitrarily selected sum of $1,200 for daring to file a formal motion for reconsideration, on legal grounds, of two of his orders granting motions by defendants to strike certain affirmative defenses to their counterclaims.

e). Judge Curtis, as affirmatively demonstrated by statements in two of his formal orders, had predetermined the preliminary injunction application adversely to petitioner, even though he had also refused to hear *any* of the relevant evidence.[4]

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[4] Specifically, in an order dated November 23, 1976, entered December 1, 1976, emphasizing Judge Curtis' adherence to his *sua sponte* subordination of the various issues on which a preliminary injunction application had been filed to the issue of patent validity, on which no such application was pending, he stated that "on the present state of the record, this court would not issue a temporary injunction prohibiting the issuance of trade secrets. . . .".

In a further order dated December 1, 1976 and entered December 6, 1976, Judge Curtis extemporized:

"If a hearing on the requested preliminary injunction were to be held on the present record, the injunction would have to be denied. Rather than preserving the status quo, such an injunction would prevent the defendants from selling their products under the trademarks now in use and from using several manufacturing processes currently employed. This would seriously hinder, if not completely destroy, the defendants' business, without there ever having been an opportunity of discovering the details of the claimed secrets or of proving either nonuse or invalidity of these secrets."

Deeming that these revelations were important evidence of a departure from the rigorous standard of conduct demanded by 28 U.S.C. 455(a), whereby a federal judge must not only *be*, but must in all respects *appear to be*, completely impartial, petitioner on February 11, 1977 moved that Judge Curtis be disqualified from sitting further in Civil Action 75-2311.[5] Concurrently with this motion, petitioner separately moved for reference of the disqualification issue to another judge of the district court for decision.

Defendants did not appear in regard to either motion. Nevertheless, on February 18, 1977, in Order No. 48, App., p. 3a, Senior Judge Curtis, without oral hearing, expressly denied the disqualification motion and *sub silentio* denied the motion for reference of the disqualification issue to another judge. This order is premised upon:

(1) a reckless accusation, later demonstrated to be false, that petitioner's counsel filed the disqualification motion because "she has become angry with this court because of a series of adverse rulings which apparently have frustrated her litigation strategy" (App., p. 3a).

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[5] Senate Report 93-419, 93rd Cong., 1st Sess. (1973) at p. 3 and House Report 93-1453, 93rd Cong., 2d Sess. (1974) at p. 2 note that before 28 U.S.C. 455(a) was enacted, the existence of "dual standards, statutory and ethical", of judicial conduct had "the effect . . . in some circumstances, to weaken public confidence in the judicial system." These reports further emphasize that to improve and strengthen such confidence, Congress essentially codified the 1973 American Bar Association Code of Judicial Conduct in 28 U.S.C. 455, thereby adopting and endorsing the rigorous "appearance" standard of judicial conduct defined in *Commonwealth Coatings Co.* v. *Continental Casualty Co.*, 393 U.S. 145 (1968). See e.g., Note, "The Elusive Appearance of Propriety: Judicial Disqualification Under Section 455", 25 DePaul L. Rev. 104 (1975); Frank, "Commentary on Disqualification of Judges-Canon 3C", 1972 Utah L. Rev. 377 (1972).

(2) a subjective review of Judge Curtis' *own* "*recollection* of the record" (App., p. 3a; emphasis added) which led to the convenient conclusion "that there are no facts upon which the impartiality of this court might reasonably be questioned" (ibid.) and

(3) Judge Curtis' *own* articulation of the judicially created "duty to sit" doctrine [6] which, together with various other doctrines of judicial origin, has been utilized for more than 50 years to devitalize the bias and prejudice statute, 28 U.S.C. 144.[7]

Because of the inaccurate cornerstone fact premise of Order No. 48 that anger of petitioner's counsel prompted the motion to disqualify, petitioner on March 4, 1977 filed a renewed and supplemental motion for disqualification of Judge Curtis, again requesting a reference to another judge for decision. This motion was supported by (i) an affidavit of petitioner's president to the effect that the motion was filed because he personally deemed that Judge

[6] I.e., "The court recognizes its responsibility to view plaintiff's accusations objectively and impartially and to disqualify itself if its 'impartiality might reasonably be questioned.' But this court also recognizes its responsibility to pursue with all diligence the management of a case assigned to it and make such judgments from time to time as circumstances require to the end that the controversy may be expeditiously litigated and a fair and just result obtained" (App., p. 3a).

[7] One of the major purposes of 28 U.S.C. 455(a) as expressed in its legislative history was *abolition* of the "duty to sit", which was deemed by Congress to have rendered 28 U.S.C. 144 virtually useless in persuading a judge to disqualify himself, even when reasonable, objective and disinterested observers would believe he should do so. See, e.g., S.R. 93-419 at p. 5; H.R. 93-1453 at p. 5, see also generally "Hearings before the Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, United States Senate, 93rd Cong., 1st Sess. on S-1064" (1973), hereinafter "Senate Hearing" and "Hearings before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the Committee on the Judiciary, House of Representatives, 93rd Cong., 2d Sess. on S-1064" (1974), hereinafter "House Hearings".

Curtis had failed to display the attitude of objective impartiality to which every litigant is entitled, which also stated the bases for his beliefs, (ii) a solemn certificate of the falsely accused counsel that neither her anger nor any other personal emotion of hers formed any part of the motive for petitioner's filing of the disqualification motion and (iii) a further memorandum pointing to new incidents that had occurred since the filing of the original disqualification motion, which additionally evidenced the impropriety of Judge Curtis' continued participation under 28 U.S.C. 455(a).

The supplemental motion was denied in Order No. 49 (App., p. 5a) on March 8, 1977, four days after its filing. Defendants again made no appearance. This order

(1) expressly refuses to refer the disqualification issue to another judge, holding "I would consider it an abdication of my duty to assign this motion to any other judge for a ruling". (App., p. 5a).

(2) concludes "As set forth in my order dated February 18, 1977 that *in my judgment*, there is no basis upon which this court's impartiality might reasonably be questioned" (App., p. 5a, emphasis added) and thereby admits that Judge Curtis decided the motion based upon the legislatively overruled *subjective* standard of the predecessor to 28 U.S.C. 455(a), squarely repudiated by Congress in its enactment of the latter [8] and,

(3) purports to "find nothing in the additional papers [i.e., the Lee affidavit, the certificate of counsel and the

[8] Under the predecessor to 28 U.S.C. 455(a), a judge was required to disqualify himself if it would be "improper, *in his opinion*, for him to sit . . ." (emphasis added). Both S.R. 93-419 and H.R. 93-1453 stress the intent of Congress to repudiate this *subjective*—and wholly impotent—standard of judicial conduct by adopting the objective and rigorous "appearance" standard of 28 U.S.C. 455(a).

accompanying memorandum] which would justify this court in changing its original ruling" [9] (App., pp. 5a-6a).

On May 2, 1977, Lee Pharmaceuticals filed its petition for writ of mandamus in the Court of Appeals for the Ninth Circuit seeking to compel Judge Curtis to refrain from sitting further in Civil Action 75-2311, on the ground that his conduct had shown that his impartiality might reasonably be questioned under 28 U.S.C. 455(a).[10] The mandamus petition set forth some eleven "marked departures from detached impartiality" by Judge Curtis and, in a thirty-one page section, exposed the details of these eleven specific incidents. According to a letter of the Clerk of the Ninth Circuit Court of Appeals (App., p. 67a) this petition was not conveyed to the "motion panel" until July 5, 1977. On July 12, 1977, *one* week later, it was denied by a summary order (App., p. 2a) presumably entered pursuant to Ninth Circuit General Order No. 4 (App., p. 70a) and based upon a conclusion by the motion panel that the "subject matter is not appropriate for writ procedure".[11] Under this general

[9] This implicit adherence to the false accusations against petitioner's counsel first advanced in Order No. 48 is notably at odds with the *appearance of impartiality*. A truly detached judge would be expected to make an effort to correct the record, *regardless* of whether or not he continued to refuse to disqualify himself.

[10] Judge Pence's subsequent bench opinion, *e.g.*, App. pp. 13a-14a, in part deals inappositely with a motion to disqualify filed May 19, 1977 which was not premised on 28 U.S.C. 455(a) but upon Judge Curtis' confession of lack of "expertise" requisite to deal with trade secret issues of the case. *That* motion is inapposite here, even as it actually was before Judge Pence, and hence is not otherwise treated in this petition.

[11] This presumption is consistent with the Ninth Circuit's essentially contemporaneous explanation in *Bauman* v. *United States District Court*, 557 F.2d 650, 653-4 (9 Cir. 1977) that it has virtually abandoned the use of supervisory mandamus because

> "Unprincipled use of that power could also operate to undermine the mutual respect that generally and necessarily marks the relationship between federal trial and appellate courts. Further, without articulable and practically applicable guidelines to govern the issuance of extraordinary writs, appellate judges would continually be subject to the temptation to grant such relief merely because they are sympathetic with the purpose of petitioners' underlying actions, or because they question the trial court's ability to direct the litigation efficiently or impartially."

In short, litigants in the district courts of the Ninth Circuit are at the mercy of any trial judge who runs amok or otherwise succumbs to a temptation to behave in an undisciplined or unprincipled manner. No succor from the Ninth Circuit is to be expected until after the trial court has done its worst.

order, such a summary denial is "not [to] be regarded as a decision on the merits".

While the mandamus petition was pending, petitioner referred its entire text, plus all of its exhibits, to a qualified psychiatric practitioner with both civil and criminal forensic experience, Dr. Leon Yochelson, with the request that he formulate an independent professional opinion as to whether Judge Curtis' "impartiality might reasonably be questioned". On July 13, 1977, Dr. Yochelson supplied his conclusions in the form of an affidavit (App., p. 34a), which includes the following averments:

> "11. Based solely upon my review of the aforementioned Exhibit A and Exhibit B documents and having neither read nor considered any other part of the record in Civil Action 75-2311 JWC, it is my professional opinion that the conduct of Judge Jesse W. Curtis in Civil Action No. 75-2311 JWC is such that his impartiality might reasonably be questioned; It is my further opinion that the conduct of Judge Curtis demonstrates that he is strongly disposed against the plaintiff and its counsel.
>
> "12. In my professional opinion, based on my reading of only the papers which are Exhibits A and B, Judge Curtis has demonstrated by his conduct that he is not capable of a detached and objective determination of the question of whether his

impartiality in Civil Action No. 75-2311 JWC might reasonably be questioned." (App., p. 36a).[12]

This affidavit was filed in the Ninth Circuit Court of Appeals on July 15, 1977 as part of a request for reconsideration of the July 12, 1977 order. A summary denial of reconsideration was entered by that court on July 26, 1977 (App., p. 2a).[13]

On July 20, 1977, however, Judge Curtis addressed a "Memorandum to Chief Judge Stephens" (App., p. 7a) in which (a) he asserted for the first time that he had earlier refused to disqualify himself "upon the ground that the only basis for disqualification which has been cited is that I have made several rulings adverse to the plaintiff" (App., p. 7a) [14] and (b) in view of paragraph 12 of the Yochelson affidavit, he sought appointment of "some judge outside of this district . . . to review the case and my conduct and to determine whether there is any basis upon which my impartiality might reasonably be questioned". (App. pp. 7a-8a)

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[12] The affidavit also avers that Dr. Yochelson has had no previous association of any nature with plaintiff or its counsel and has not personally examined Judge Curtis, but has formulated his opinion solely on the paper record of the mandamus petition.

[13] On August 19, 1977, petitioner filed a petition, No. 77-259 in this Court for review of that ruling. Subsequently, petitioner moved for dismissal thereof pursuant to this Court's Rule 60(2) when it became apparent that the September 14, 1977 hearing before Judge Pence had rendered it advisable to seek further Ninth Circuit review before any action by this Court.

[14] This belated reinterpretation of the earlier orders denying disqualification distorts the record. It obviously constitutes an effort to equate 28 U.S.C. 455(a) to 28 U.S.C. 144 and, on that basis, to bring the operative facts here within the umbrella of § 144 precedent—such as, e.g., *Botts* v. *United States*, 413 F.2d 41 (9 Cir. 1969), which holds in essence that the conduct of a judge in a pending case provides no basis for his disqualification, but affords only a reason for appeal.

Petitioner's timely motion to stay proceedings pending such appointment and review, its objection to certain facets of the procedure and its motion to define a fair procedure for such review were all denied, even though defendants made no comment with respect to any of them. On August 19, 1977, however, Chief Judge Stephens of the respondent court formally appointed the Honorable Martin Pence, nominally of the District of Hawaii, "to review the affidavits and averments filed in the above captioned case in support of plaintiff's contention that Judge Curtis should be disqualified and to determine whether there is any basis upon which his impartiality might reasonably be questioned." (App., 9a).

Essentially concurrently, on August 22, 1977, petitioner filed a further renewed and supplemental motion to disqualify Judge Curtis pursuant to 28 U.S.C. 455, detailing the many additional instances of his departure from the strict appearance of impartiality standard that occurred after the March 8, 1977 date of Order No. 49.[15]

On August 29, 1977, petitioner sought emergency mandamus relief from the Ninth Circuit to preclude Judge Pence from proceeding and for a stay pending this Court's

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[15] These instances are described in the excerpt from the subsequent mandamus petition, No. 77-3361, App., at 43a to 66a, especially at 49a to 66a.

They include the branding of petitioner's counsel as "contemptuous" in a formal court order and the subsequent refusal to hold a contempt hearing or expunge the epithet on the ground that such counsel, "though clearly contemptuous, has not been charged with contempt".

Significantly, counsel's appeal from the latter ruling under the collateral order doctrine of *Cohen* v. *Beneficial Loan Co.*, 337 U.S. 541 (1949) was summarily dismissed as not based upon an appealable order by a Ninth Circuit two-judge motion panel on November 23, 1977, thus leaving counsel effectively remediless for this gratuitous judicial slur.

A timely request for in banc rehearing has not yet been acted upon.

ruling on the availability of certiorari in No. 77-259, note , *supra*. The focus of this petition was that, absent preliminary vacation of Judge Curtis' Orders 48 and 49, review thereof by another judge of coordinate jurisdiction constrained by "law of the case" doctrine—see, e.g., *ACF Industries, Inc.* v. *Guinn*, 384 F.2d 15 (5 Cir. 1967)—would be, at best, a futile exercise. A summary denial of this petition was entered September 1, 1977. Meanwhile, the district court clerk scheduled a hearing before Judge Pence on all facets of whether Judge Curtis should be disqualified under 28 U.S.C. 455 (a) for September 14, 1977.[16]

At this hearing, petitioner's counsel orally reviewed in detail for over an hour many highlights of Judge Curtis' conduct which establish that his impartiality *may* "reasonably be questioned", including many incidents that occurred after March 8, 1977. After brief remarks from defendant's counsel, Judge Pence then excused himself for about ten minutes and returned to deliver an obviously substantially preformulated, hour-long bench opinion (App., pp. 10a-30a) denying disqualification.

In this opinion, Judge Pence in substance

1) failed to deal with or consider any instances of challenged conduct that occurred after March 8, 1977, even though these incidents reflect a clear propensity to ignore the ethical constraints of the Code of Judicial Conduct and a marked disregard for truth and fairness. See the excerpt, App., pp. 43a to 66a from petitioner's subsequently filed mandamus petition, No. 77-3361, which describes in detail at 49a to 66a the challenged post-March 8 conduct.[17]

[16] Judge Pence was thus to review Orders 48 and 49 and also to rule *de novo* on petitioner's supplemental and renewed motion filed August 22, 1977.

[17] Judge Pence was understood by petitioner to have orally denied the August 22, 1977 supplemental motion to disqualify, notwithstanding his failure to consider these incidents. In a written order filed November 14, 1977 (App., p. 31a) Judge Pence confirmed and formalized the denial, without specific comment on how he purports to justify the conduct involved in the face of § 455(a).

2) refrained from mentioning the Yochelson affidavit, paragraph 11, quoted *supra*, p. 13, concerning which he earlier flatly refused to hear discussion and stated: "Just leave that out. . . . I will simply say . . . that the impartiality of a judge is not going to be judged by, determined by a psychiatrist".

3) identified himself personally with Judge Curtis in ruminations in which he analogized the attempts to disqualify himself in other cases and manifested extreme sensitivity about the "rights" of a judge presiding over a case, albeit no concern whatever for every litigant's *right* to be heard before a judge who not only is, but appears to be, scrupulously impartial, or for improving the current sorry state of public confidence in the judicial system. See, e.g. App., p. 19a, 20a.

4) held that, even under § 455(a), the party seeking disqualification must point to evidence of *actual personal* bias or prejudice stemming from an extrajudicial source, usually comprising facts outside the record of the case, before that party can be taken seriously.

5) held that a judge has a "right" to behave unreasonably, arbitrarily and discourteously to one party to a pending case before him on a selective basis—and that such behavior is not evidence that his "impartiality may reasonably be questioned" (e.g., App., p. 23a).

6) held that judges are entitled, notwithstanding specific Canon 3A4 of the Code of Judicial Conduct, or its more general Canon 2, to communicate *ex parte* with "either party" (App., p. 21a) to a case about controverted matters through their law clerks.

7) in short, treated 28 U.S.C. 455(a) as essentially coextensive with 28 U.S.C. 144 and 28 U.S.C. 455(b)(1)

and engrafted upon 28 U.S.C. 455(a) the anesthetizing judge-made rules which have rendered Section 144 a virtual nullity for at least fifty years.

On October 11, 1977, petitioner again sought appellate review by mandamus of the disqualification issue, this time in the context of Judge Pence's bench ruling. In particular, the Ninth Circuit was requested to direct the respondent district court that:

> "1. 28 U.S.C. 455(a), enacted in 1974, is henceforth to be applied and construed consistently with its legislative history and its plain language to disqualify a district judge whenever 'his impartiality *might reasonably be questioned*' on *any* basis and is *not* to be narrowed by judicial interpretation which either
>
> (a) renders it coextensive with 28 U.S.C. 144 and 28 U.S.C. 455(b)(1), or
>
> (b) imposes the same judicial gloss that the opinions of the federal courts superimposed upon 28 U.S.C. 144 over approximately the last 50 years.
>
> 2. Specifically, 28 U.S.C. 455(a) is to be construed and applied based on the understanding that it
>
> (a) repudiated the judicially ordained principle that a judge has a 'duty to sit' in the cases to which he is assigned which compels (i) a reluctance to grant motions seeking disqualification and (ii) a niggardly construction of the ambit of the disqualification statutes;
>
> (b) also repudiated, as inapplicable to the appearance standard of § 455(a), various judicially created legal doctrines by which 28 U.S.C. 144 has been strictly construed to deny disqualification whenever allegations of *actual* bias or prejudice were based on circumstances arising in a pending case; and

> (c) established the principle that all evidence, including medical evidence and evidence of conduct arising in the case itself, relied on by any party and relevant within the scope of Rule 26(b)(1) to whether a judge's impartiality might reasonably be questioned is to be considered under 28 U.S.C. 455(a)."

In an order filed by the Ninth Circuit on November 3, 1977, this petition was summarily denied without comment—presumably pursuant to that Court's General Order 4 and the doctrine of *Bauman* v. *United States District Court, supra.*

Senior Judge Curtis continues even currently to behave in an undisciplined manner, to vent personal emotion against petitioner and its counsel, and to disregard the ethical canons of the Judicial Code and the established procedures and usages of the law as defined in the extant rules. As recently as January 9, 1978, he not only purported to grant a summary judgment in defendants' favor on trademark issues—in face of a motion to extend petitioner's time for response necessitated, in the view of its counsel, by Judge Curtis' own failure to rule upon the availability to petitioner's officers and employees of certain "restricted information" affidavits relied upon to support defendants' summary judgment case,[18] and in derogation of his oral promise of November 7, 1977 that "if you need some additional time [to answer the summary judgment motion], you will have it" (November 7, 1977 Tr., p. 9, ll. 6-7)—but he stated:

> "There is pending a motion to continue to extend the time within which the plaintiffs may submit additional information on the trademark issue, but I

[18] Significantly, this is a motion on which a prompt ruling was orally promised at the November 7 hearing. Despite four subsequent formal written reminders of the need for a ruling and one informal request to the judge's docket clerk that a ruling be made, none has been forthcoming to date.

have already given one extension and nothing has been filed. I do not see any real good cause having been shown why that material has not been filed, expect that I suspect, from reading the trademarks and examining the trademarks—or the trade names and the trademarks from which they are alleged to infringe, it seems apparent on the face that there is no infringement.

I would therefore feel that it is unlikely that Ms. Sears would be able to furnish the Court with any information which would assist the Court in that decision. I think that is largely the reason why there has not been anything supplied.

It is very obvious in the face of these trademarks and the trade names are different and there is no chance of infringing. So, on that issue, I will grant the motion for summary judgment on the trademark issue and the unfair competition allegations in Count Two." (January 9, 1978 transcript, p. 5a, 19 to p. 6, l. 14)

Notably, petitioner has been permitted *no* discovery whatever on these issues since it was first permitted to plead them in a January 1976 amended complaint.

While Judge Curtis subsequently rescinded this grant of summary judgment and instead placed petitioner under an order to show cause why summary judgment should not be granted, it remains manifest that (1) he has prejudged the matter without seeing petitioner's opposition papers and (2) he has so acted based on a subjective fact finding of his own that the trademarks in issue "are different", in derogation of Rule 56 and all parties' jury trial demands.

REASONS WHY THE WRIT SHOULD BE GRANTED

1. *The questions presented yield to no others in current importance to the proper functioning of the judicial system.*

The legislative history of § 455(a)[19] leaves no reasonable doubt that it was intended by Congress to remedy the recognized ineffectuality of preexisting judicial disqualification statutes, including § 144, to the end that the public could have confidence in the impartiality and fairness of the judicial process.[20]

The remedial statute has nonetheless been interpreted below—and is increasingly being interpreted by a significant number of lower federal courts[21] as if it were the identical twin of § 144. These courts, including the district court in this case, are taking the tack that a judge's "impartiality may *reasonably* be questioned" under § 455 (a) *only* if a *personal* bias and prejudice based upon

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[19] Senate Report No. 93-419, 93rd Cong., 1st Sess. (1973); House Report No. 93-1453, 93rd Cong., 2d Sess. (1974); Senate Hearings *supra;* House Hearings, *supra;* Thode, Reporter's Notes to Code of Judicial Conduct (1973); see also the Frank article and the DePaul L. Rev. Note cited *supra*, note 5, n. 9 and Note, "Disqualification of Judges and Justices in the Federal Court", 86 Harvard L. Rev. 760 (1973); Note, "Disqualifying Federal District Judges Without Cause", 50 Washington L. Rev. 109 (1974).

[20] As Senator Birch Bayh, a member of the Senate Committee that passed on § 455(a), put it "No statute creates more distrust than does the Section 144 procedure for disqualification for prejudice". Senate Hearings, p. 13.

[21] See, e.g., *Davis* v. *Board of School Commissioners of Mobile County*, 517 F.2d 1044 (5 Cir. 1975); *Parrish* v. *Board of Commissioners of Alabama State Bar*, 524 F.2d 98 (5 Cir. 1975); *Simonsen* v. *General Motors Corp.*, 425 F. Supp. 574 (E.D.Pa. 1976); *Honneus* v. *United States*, 425 F. Supp. 164 (D. Mass. 1977); *Fong* v. *American Airlines, Inc.*, 431 F. Supp. 1334 (N.D. Cal. 1977); *United States* v. *Corr*, 434 F. Supp. 408 (S.D.N.Y. 1977); *Hawaii-Pacific Venture Capital Corp.* v. *Rothbard*, 437 F. Supp. 230 (D. Hawaii 1977).

some extrajudicial fact or occurrence pursuant to § 144 can be proved.[22] This interpretation derogates Congressional judgment that § 455(a) represented a sorely needed reform and undermines the objective of improving public confidence in the fairness and impartiality of the judiciary.

In part, the sabotage of Congressional intent that is effectively occurring in the lower courts may result from the failure of Congress to specify what procedure is to be utilized, including who shall determine the issue of whether "impartiality might reasonably be questioned" and what evidence is to be considered, in order properly to implement § 455(a)'s new statutory standard of judicial conduct. Significant genuine confusion has been occasioned by lower court efforts to rationalize § 144 *procedure* with § 455(a)'s new standard and to puzzle out the procedural effect, if any, of the repeal of the predecessor statute's requirement for recusation "whenever, in his opinion" it would be improper for a judge to continue to sit. Indeed, the Seventh Circuit has commented on "the philosophical dilemma created by the objective—subjective conundrum" which results from the circumstances that

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[22] To illustrate, in *United States* v. *Corr*, *supra*, one respected district judge put it that "The test under that provision [i.e., § 455(a)] is not the subjective belief of the defendant or that of the judge, but whether facts have been presented that, assuming their truth, would lead a reasonable person reasonably to infer that bias or prejudice existed, thereby foreclosing impartiality of judgment" 434 F. Supp. at 412-13.

But the plain language and the legislative history of § 455(a), suggest a far broader test was intended, and that a reasonable inference of partiality might be drawn from any of limitless facts, *not* solely because of the probability of *personal* bias or prejudice extraneous to the record in the strict § 144 sense. Indeed, if Congress had meant to equate "partiality" under § 455(a) to "personal bias or prejudice", it seemingly would have selected those very words for § 455(a), particularly since they do appear in §§ 144 and 455(b)(1).

> ". . . no factual or concrete examples of the appearance of impartiality were provided in the Congressional debates. Moreover, because a judge must apply the standard both as its interpreter and its object, the general standard is even more difficult to define." [23]

Actually, for a challenged judge to himself rule on the appearance of his own conduct would seem to run afoul of Coke's famous principle, *aliquis non debet esse judex in propria causa* [24]—no man shall be a judge in his own case—a principle long ago adopted as the common law rule in this country. See *Spencer* v. *Lapsley*, 61 U.S. (How.) 264, 266 (1858).

Since this common law rule is one of the premises for the existence of disqualification statutes, Spencer, *supra*, 61 U.S. (How.) at 270; see all Frank, Disqualification of Judges, 56 Yale L.J. 605, 626-30 (1947), it may be asked whether it is implicit in § 455(a) that someone other than the challenged judge shall evaluate the appearance of his conduct.

In reluctant deference to the similar conclusion, arrived at on medical grounds, asserted in paragraph 12 of the Yochelson affidavit, *supra*, pp. 13-14, Judge Curtis, of course, asked Chief Judge Stephens to obtain a different judge outside the district to review Orders 48 and 49 (App,. pp. 3a-6a). Any objectivity that such an appointment *might* have imported into the proceeding below, however, was negated by (i) the failure to vacate Orders 48 and 49 to permit *de novo* determination by the new judge, (ii) the fact that Judge Pence was only nominally from another district, having been on special assignment to the Central District of California for nearly a year at the

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[23] *SCA Services, Inc.* v. *Morgan*, 557 F.2d 110, 116 (7 Cir. 1977).

[24] I Coke Institutes,* 141a; Dr. Bonham's Case 8 Co. Rep. 113b 77 Eng. Rep. 646 (K.B. 1609).

time of appointment, and (iii) the personal sympathy and sense of communion for Judge Curtis that Judge Pence manifestly entertains.

The lower courts are obviously both powerless and psychologically ill-equipped to devise procedures that will make § 455's objective test work. This Court *could* do so, however—and in the interest of improving society's trust in the judiciary, should take the opportunity to do it now.

This issue of public confidence in the judicial system is incandescent. As recently as January 8, 1978, one-third of the CBS television network's weekly "Sixty Minutes" was devoted, in the specific context of the conduct of Chief Judge Ritter of the District of Utah, to whether a judge should continue to sit in cases involving parties —in his case, especially the federal government and the State of Utah—toward whom he has behaved in a selectively discourteous, nondetached, emotional manner, exhibiting an arbitrary predisposition to rule adversely, *regardless* of the apposite facts or law. That Joseph Goulden's "The Benchwarmers",[25] dealing with conduct of questionable competence, integrity and impartiality by sitting federal judges, was recently a popular bestseller, further shows the widespread public concern, reaching well beyond the bounds of bench and bar, that the judicial system function in a manner deserving of society's confidence.

The ultimate interpretation and application of § 455 (a) *a fortiori* will profoundly affect the public consensus on whether our judicial system works. If that interpretation be left to the lower federal courts, to continue as Judges Curtis and Pence did in this case, to disembowel § 455(a), so as to avoid real or fancied personal embarrassment to the judges themselves, the public will inevitably react adversely.

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[25] Weybright and Talley (1974).

2. *The decision below conflicts importantly with decisions from other lower federal courts.*

a) The decision below conflicts with recent decisions of the Tenth Circuit insofar as it purports to hold that a judge's words on the record of a case demonstrating "feelings of hostility" toward a party, *United States* v. *Bray*, 546 F.2d 851, 856 (10 Cir. 1977), or its counsel, *United States* v. *Ritter*, 540 F.2d 459 (10 Cir. 1976), or implying prejudgment of an issue, *Webbe* v. *McGhie Land Title Co*, 549 F.2d 1358 (10 Cir 1977), are neither evidence that his "impartiality may reasonably be questioned" under § 455(a) nor cause for requiring him to disqualify himself pursuant to that section.

Judge Pence purported to rule in effect, that these Tenth Circuit cases, all relating to excesses committed by the aforementioned Judge Ritter, are *sui generis*, confessedly basing this determination on his personal opinions of the individuals involved. But the § 455(a) standard is an objective legal standard —and presumably the Tenth Circuit would apply it to *any judge* who behaved similarly to Judge Ritter, in any case, including Judge Curtis in this case.

The conflict is a broad one, moreover, since the cases from the Fifth Circuit and from various district courts cited in note 21, *supra*, are in agreement with the courts below in this case, while the Eighth Circuit in *Reserve Mining Co* v. *Lord*, 529 F.2d 181, 185-6 (8 Cir 1976)—albeit without citing § 455(a)—has clearly adopted the standard espoused in the cited Tenth Circuit cases. So has the Seventh Circuit in *SCA Services* v. *Morgan*, 557 F.2d 110, 114 (7 Cir. 1977) which holds that pre-§ 455(a) precedent affords "no guidance" in interpreting the new statute.

b) The ruling in this case that judges are entitled to confer *ex parte* through their law clerks with only one of the parties to a case about an issue in contro-

versy conflicts squarely with the pre-§455(a) Third Circuit holding in *Rapp* v. *Van Dusen*, 350 F.2d 806 (3 Cir. 1965) adopted by the Tenth Circuit in *Texaco, Inc.* v. *Chandler*, 354 F.2d 655 (10 Cir. 1965) that any *ex parte* comunication between a judge and one party to a pending case about issues in that case creates an appearance of impropriety such as to require the judge to recuse himself.[26] It also conflicts in principle with this Court's own pre-§ 455(a) adoption of the "appearance of propriety" standard of judicial conduct in *Commonwealth Coatings Corp.* v. *Continental Casualty Co*, 393 U.S. 145 (1968).

c) The refusal below to consider the Yochelson affidavit is in conflict in principle with the receipt of psychiatric evidence in all types of civil and criminal cases on issues of mental state, capacity and competence. *In particular*, in *Green* v. *Murphy*, 259 F.2d 591 (3 Cir. 1958) psychiatric evidence similar to that here was received and considered on a § 144 issue; See Forer, "Psychiatric Evidence in the Recusation of Judges", 73 Harvard L. Rev. 1325 (1960), which, after reviewing the *Green* case, concludes that ". . . when the judge is presented with the opinion of a psychiatrist that the facts alleged give rise to an inference of prejudice, he should recuse himself, or if he is not yet willing to do so, he should be required to seek further psychiatric evidence from other experts. If this evidence substantiates that presented by the movant, withdrawal of the judge should be mandatory."

d) The Ninth Circuit refusal to review the disqualification issue on its merits *now* is in square

[26] The *Rapp* Court said, and the Tenth Circuit in *Texaco* reiterated that: ". . . the proper administration of justice requires of a judge not only actual impartiality, but also the appearance of a detached impartiality. Litigants are entitled, moreover, to a judge whose unconscious response in the litigation may be struck only in the observing presence of all parties and their counsel." 350 F.2d at 812; 354 F.2d at 657.

conflict with the Seventh Circuit's ruling in *SCA Services, Inc* v. *Morgan*, 557 F.2d 110, 117 (7 Cir. 1977) that "the specificity and legislative intent of Section 455 are sufficiently different from Section 144 as to warrant a departure from our previous position" that mandamus is not available to review a district judge's decision under § 144.[27]

This Ninth Circuit stance is contrary also to this Court's own recognition in *Berger* v. *United States*, 252 U.S. 22, 36 (1921) that appellate review of a judicial disqualification issue *after* disposition on the merits is futile—i.e.,

> ". . . The remedy by appeal is inadequate. It comes after the trial, and if prejudice exists, it has worked its evil, and a judgment of it in a reviewing tribunal is precarious. It goes there fortified by presumptions, and nothing can be more elusive of estimate or decision than a disposition of a mind in which there is a personal ingredient."

As well articulated in *Massie* v. *Commonwealth*, 393 Ky. 588, 20 S.W. 704 (Ct. App. 1892),

> ". . . There are many ways that a partial or prejudiced judge may knife a party . . . without it appearing from the record, or without his being able to ascertain the act."

The insidious way in which a partial judge can change the complexion of a case while it is ripening for appeal—and thus preclude the litigant he dis-

[27] The Seventh Circuit was formerly one of a minority of federal appellate courts holding mandamus unavailable to review a judicial disqualification issue, e.g. *Action Realty Co.* v. *Will*, 427 F.2d 843, 845 (7 Cir. 1970). The Ninth Circuit, by contrast, stood with the majority of circuits in holding mandamus a proper way of reviewing a judge's refusal to disqualify himself—e.g. *In re Honolulu Consolidated Oil Co.*, 243 F. 348 (9 Cir. 1917); *Connelly* v. *United States District Court*, 191 F.2d 692 (1951); *Gladstein* v. *McLaughlin*, 230 F.2d 762 (9 Cir. 1955)—until recently. See its *Bauman* decision *supra*, note 11.

favors from having a proper record for ultimate review,[28] is also well summed up by Goldberg and Levenson, quoting Dean Wigmore, in "Lawless Judges" (1969) at 230, as follows:

> "The public does not fully understand the position of the judge in respect to his immunity from exposure by the bar. His iniquities or incompetencies, if any, are so committed as to become directly known only to a few persons in any given instance; and these few persons are the attorneys in charge of the case. To bear upon testimony against him now is to risk professional ruin at his hands in the near future. Moreover, this ruin can be perpetuated by him without fear of the detection of his malice, because a judge's decision can be openly placed upon plausible grounds, while secretly based on the resolve to disfavor the attorney in the case."

While turning a deaf ear and a blind eye to such district court abuses may save appellate time in the short run—certainly a desideratum in the overloaded Ninth Circuit—it obviously compounds the chance that the ultimate appeal will be unable to redress the district court's wrong. Moreover, if the appeal *does* result in the redress minimally required under the constitutional guarantee of fair trial before a fair and impartial tribunal—to wit, reversal and remand for a new trial before a different judge—the short term conservation of appellate judicial resources will be more than compensated by the long term squandering of district court time and manpower and the unnecessary public expense of two trial court proceedings.

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[28] By repeatedly making inaccurate fact findings in pretrial orders and refusing to correct these errors when they are drawn to his attention, Judge Curtis is engaged in improperly altering the ultimate appellate record in *this* case to petitioner's detriment and defendants' unfair advantage.

> And, even if the present Ninth Circuit policy of postponing review of judicial disqualification issues *could* be shown to be more efficient, a policy that sacrifices the constitutional right of fair trial before an impartial tribunal on the altar of short-term expediency merits careful scrutiny in this Court *before* its implementation becomes routine in any lower court.

3. *The Ninth Circuit is in need of this Court's supervision to correct its demonstrated insensitivity toward judicial breaches of ethics and its demonstrated reluctance to supervise its district judges.*

Bauman, supra, eloquently describes the Ninth Circuit's current disinclination to supervise its district judges or curb any propensities they may exhibit toward capricious and arbitrary behavior, including frolics of their own outside the rules which define current standards of due process requisite to a fair trial, and habitual breaches of judicial ethics.

For example, the record below and that in No. 77-4,[29] *Amalgamated Sugar Co.* v. *United States District Court for Northern California* show that at least three district judges within the Ninth Circuit—to wit, Judges Curtis, Pence and Boldt—customarily pay no attention at all to Canon 3A4 of the Code of Judicial Conduct and its prohibition against *ex parte* communications.[30]

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[29] Filed July 1, 1977; certiorari denied October 3, 1977.

[30] Interestingly, Thode, "Reporter's Notes to the Code of Judicial Conduct" (1973)—universally acknowledged as an authoritative part of the Code's "legislative history"—observes that "In an adversary proceeding *ex parte* communications by the judge to a party or his lawyer or by a party or his lawyer to the judge clearly should be precluded" (p. 53) and warns that "A judge receiving a communication about a case that is not before him should . . . be aware that if the proceeding does come before him, in the future, any present communication about the proceeding might require his disqualification at that future point by reason of Canon 3C(1). . . ." (*ibid.*). Canon 3C(1) is worded identically to § 455(a).

As another example, Judges Curtis and Pence have also demonstrated callous disregard for Canon 3A3's requirement that "A judge should be patient, dignified and courteous to [those] . . . with whom he deals in his official capacity." Judge Pence even went so far as to suggest that a judge's First Amendment right of free speech effectively permits him to speak as he pleases,[31] on the record of any case—and thereby obviously nullifies this Canon in his view.

A further example may be seen in the disdain of Judges Curtis and Pence—and at least implicitly of the Ninth Circuit itself—for the judicial oath set out in 28 U.S.C. 453 and for Canons 2A and 3 of the Judicial Code. This disdain is manifest in Judge Curtis' repeated entry of inaccurate fact findings and his undeviating refusals to correct them when they are affirmatively called to his attention [32]—and in the tolerance that Judge Pence expressly, and the Ninth Circuit tacitly, accord to this misconduct.

This situation is grave. It can be judicially corrected, if at all, only by this Court.

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[31] Said Judge Pence, in excusing Judge Curtis' continued *ad hominem* attacks, unnecessary to any ruling, on the good faith of petitioner and its counsel, ". . . there is nothing in any of the rules or regulations or laws that was ever intended to deny to judges of the court the same First Amendment rights enjoyed by those who are not judges of the court". (App., p. 19a).

[32] Petitioner is ready to accept that in some instances, the original inaccurate finding *may* have resulted from inadvertent error. The refusal to make corrections when petitioner sought them and incontrovertibly demonstrated the true facts, however, is deliberate—and it mocks the judicial duty of fidelity to the truth.

CONCLUSION

The writ should be granted as asked.

Respectfully submitted,

EDWARD S. IRONS
MARY HELEN SEARS
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Attorneys for Petitioner

IN THE

Supreme Court of the United States

No. 77-1073

LEE PHARMACEUTICALS,
Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,
Respondent.

DEN-MAT, INC., ROBERT IBSEN, W. RICHARD GLACE, FRED H. BROCK AND PROFESSIONAL PRODUCTS CO.,
Real Parties In Interest.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D.C. 20001

APPENDIX

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ORDER

Filed November 3, 1977

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 77-3361

LEE PHARMACEUTICALS,
Petitioner,

vs.

UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA,
Respondent,

and

DEN-MAT, INC., ROBERT IBSEN, W. RICHARD GLACE,
FRED H. BROCK AND PROFESSIONAL PRODUCTS CO.,
Real Parties in Interest.

ORDER

Before: BROWNING and SNEED, Circuit Judges.

Upon due consideration, the petition for writ of mandamus and emergency motion for various forms of relief are denied.

/s/ James R. Browning

/s/ Joseph F. Sneed
United States Circuit Judges

ORDER

Filed July 12, 1977

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 77-1969

LEE PHARMACEUTICALS,
Petitioner,

vs.

UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA,
Respondent,

and

DEN-MAT, INC., *et al.*,
Real Parties in Interest.

ORDER

Before: CHAMBERS, HUFSTEDLER and ELY, Circuit Judges.

Upon due consideration, the petition for writ of mandamus is denied.

/s/ [Illegible]

/s/ [Illegible]

/s/ [Illegible]
United States Circuit Judges

ORDER

Filed July 26, 1977

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 77-1969

LEE PHARMACEUTICALS,
Petitioner,

vs.

UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA,
Respondent,

and

DEN-MAT, INC., *et al.*,
Real Parties in Interest.

ORDER

Before: CHAMBERS, ELY, and HUFSTEDLER, Circuit Judges.

Upon due consideration, petitioner's request for reconsideration is denied.

ORDER No. 48 DENYING PLAINTIFF'S MOTION FOR DISQUALIFICATION OF THE ASSIGNED JUDGE

Filed February 18, 1977

Plaintiff's attorneys have called upon the court to disqualify itself pursuant to the provisions of Title 28 U.S.C. § 455(a). This section provides:

> "(a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

It is apparent from the affidavits of Ms. Sears, filed in support of this and earlier motions, that she has become angry with this court because of a series of adverse rulings which apparently have frustrated her litigation strategy. Ms. Sears has a perfect right to disagree with this court's views and to challenge them in some higher court. But a disagreement of this kind forms no basis for disqualifying a judge.

The court recognizes its responsibility to view plaintiff's accusations objectively and impartially, and to disqualify itself if its "impartiality might reasonably be questioned." But this court also recognizes its responsibility to pursue with all diligence the management of a case assigned to it and to make such judgments from time to time as circumstances require to the end that the controversy may be expeditiously litigated and a fair and just result obtained.

This court has reviewed its recollection of the record in light of plaintiff's charges, and concludes that there are no facts upon which the impartiality of this court might reasonably be questioned.

IT IS THEREFORE ORDERED that the motion to disqualify this court is denied.

DATED: February 18, 1977

/s/ Jesse Curtis
JESSE W. CURTIS
United States District Judge

ORDER No. 49 DENYING PLAINTIFF'S RENEWED AND SUPPLEMENTAL MOTION FOR DISQUALIFICATION OF ASSIGNED JUDGE

Filed March 8, 1977

Proceeding under Title 28 U.S.C. § 455(a), the plaintiff has requested this court to disqualify itself from hearing further proceedings in this case, and has further moved that such motion be referred to another judge for decision. This court has considered but denied plaintiff's original motion for disqualification without referring the matter to another judge. Plaintiff now renews its motion for disqualification of this court under section 455(a) of Title 28 U.S.C. and again requests that its motion be referred to another judge for ruling.

Section 455(a) of Title 28 U.S.C. requires the judge who is presiding to make a decision as to whether his impartiality might reasonably be questioned in the subject matter litigation. This section does not contemplate such a decision being made by any one other than the judge whose impartiality is in question. I would consider it an abdication of my duty to assign this motion to any other judge for a ruling.

In accordance with this section, I have considered all relevant matters bearing on the subject of this court's impartiality and have concluded as set forth in my order dated February 18, 1977 that in my judgment there is no basis upon which this court's impartiality might reasonably be questioned.

Attached to "Plaintiff's Renewed and Supplemental Motion" is a memorandum, a certificate of Ms. Sears, and an affidavit of Henry L. Lee, Jr., setting forth allegations and conclusions upon which they base their continued effort to persuade this court to disqualify itself. I find nothing in the additional papers which would

justify this court in changing its original ruling. Plaintiff's renewed and supplemental motion for disqualification is denied.

DATED: March 7, 1977

/s/ Jesse W. Curtis
JESSE W. CURTIS
United States District Judge

MEMORANDUM TO CHIEF JUDGE STEPHENS

Filed July 20, 1977

The plaintiff in the above entitled action has on three occasions sought to disqualify me to sit further in this matter, invoking the provisions of Title 28 U.S.C. § 455 (a), which provides:

> "(a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

I have denied these motions upon the ground that the only basis for disqualification which has been cited is that I have made certain rulings adverse to the plaintiff. Several of these rulings including the refusal to disqualify myself, have been brought before the Ninth Circuit. All of the appeals and petitions for writs have been denied or dismissed, except for one appeal from an order imposing sanctions on the plaintiff and awarding attorneys' fees to the defendants in the sum of $1200. This appeal is presently pending.

Plaintiff has just filed in CA No. 77-1969, the affidavit of one Leon Yochelson, who purports to be a psychiatrist in Washington, D.C. Based upon his reading of documents furnished him by the plaintiff, Yochelson opines that I have demonstrated by my conduct that I am not capable of a detached and objective determination of the question of whether my impartiality in this action might reasonably be questioned.

I do not believe that there are any facts set forth in the papers read by Yochelson, or otherwise, upon which anyone might reasonably question my impartiality. Nevertheless, I request that you refer this matter to the Chief Judge of the Ninth Circuit, with the view that some

judge outside of this district be assigned to review the case and my conduct and to determine whether there is any basis upon which my impartiality might reasonably be questioned.

DATED: July 20, 1977

/s/ Jesse W. Curtis
JESSE W. CURTIS
United States District Judge

ORDER OF THE CHIEF JUDGE

Filed August 19, 1977

Judge Jesse W. Curtis in a Memorandum to Chief Judge Stephens filed July 20, 1977, has requested that some judge outside the Central District of California be assigned to review the affidavits and averments filed in the above captioned case in support of plaintiff's contention that Judge Curtis should be disqualified and to determine whether there is any basis upon which his impartiality might reasonably be questioned.

Therefore, pursuant to the request of Judge Curtis set forth in the above described Memorandum, IT IS HEREBY ORDERED that the Honorable Martin Pence of the District of Hawaii is assigned to review and rule upon the matter specifically identified herein above. This is not a reassignment of the captioned case and at all times Judge Curtis shall retain complete jurisdiction to proceed in the said case in any manner he deems adviseable.

DATED: Aug. 19, 1977

/s/ [Illegible]
United States District Judge

EXCERPT FROM
REPORTER'S TRANSCRIPT OF PROCEEDINGS
BEFORE HONORABLE MARTIN PENCE

PLACE: Los Angeles, California

DATE: Wednesday, September 14, 1977

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[Commencing at p. 77, l. 23]

* * * *

THE COURT: You will gather, from what I am about to say, that I have worked upon this motion to disqualify Judge Curtis and motions for disqualifications are not unknown to me. I have had motions filed before. Sometimes, even under the old rule, I have either disqualified myself or have refused to. One of the cases is out of the Ninth Circuit, Botch [sic. Botts] versus United States, I think was an appeal of my refusal to recuse myself. At least at that time I sustained.

In March of this year I had 158 pages of moving papers filed that I should have recused myself on a case that has been going on for five years. As I said, I have not yet filed my decision in that case for publication and it took me 58 pages to analyze the moving papers, and if I write an opinion on this, I'll be taking 58 pages to analyze the moving papers here.

I do not think, however that it is necessary as I have understood the plaintiff's motion that it is the sum totality of the rulings of Judge Curtis and the statements made in the course of his orders and that some of them were less than accurate and correct and that he was violating rules of Civil Procedure in handling the case to the best of his ability without following the rules, and that the sum totality not resulting in the best interest of the plaintiff would lead a reasonable person to conclude that under the new rule for disqualification that he was prejudiced or biased against the plaintiff and partial to the defendant.

Now, the Court notes in this case the motions in the matter, the motions for disqualification, a pattern which characterizes many of the plaintiff's motions throughout this litigation.

On February 14th, a motion was filed and then another one—was it supplemental? Yes—on May 20th, another motion for disqualification was filed, and then

after it had been determined by Judge Curtis that he would request Judge Stephens to appoint some other judge to sit on his motion for disqualification, more motions were filed to determine that I was not the proper person who should sit and decide this case.

Now, it is the privilege of counsel on either side to file any and all the motions they want to. It is also the privilege of the judge to determine whether or not he will give those motions consideration and whether he will rule on them.

There is no right, in the absence of a specific rule, there is no right to have argument to hear the motion when a paper is filed, so that there is no question that Judge Curtis has been faced by a great amount—and this is just a little mole hill on the mountain, I think, and I hold up the documents that have been filed in connection with this motion to disqualify him.

It is already an inch and a half or two inches high, and that doesn't indicate that that isn't good or that it is good, but I am just saying that there has been a tremendous amount of activity on the part of, it looks like both counsel, and particularly in connection with this motion here, on the part of plaintiff's counsel in the filing of, almost every time, a motion to reconsider on some ground—not that it is bad, but nevertheless, there has been a motion to reconsider on practically every one. I am not saying that it is not a motion to be considered.

So the analysis of the law involved here, and I take it the great judge—I will leave out the "great"—a judge can read from that U.S.—you can read what the Court of Appeals had intended for Judge Ritter. You can see the language. And with anyone that is familiar with him, some of this was mild compared with other cases. And a word of advice to counsel, you being outside counsel, if you have never appeared before Judge Ritter, don't ever go over there unless you have got local counsel with a pipeline at your ear all the time and even

then, it is rare that you will come out and escape without scars.

The Supreme Court has had problems, but anyhow, let's take a look at 455(a) which, no question about it, 455(a) is broader than the old statute that says that he shall disqualify himself in any proceeding where his impartiality might reasonably be questioned. I will stop right here. I will ask Mr. Irons a question here whether or not the Senate hearings indicated that a judge could not personally sit upon his own disqualification under 455(a)?

I would also hold that there is no requirement where in every case a judge disqualifies himself to pass upon his own disqualification. Each case must be handled on its own merits. Thus, I would find no fault with Judge Curtis for having a first go-around to refuse to disqualify himself. It was decided on the second go-around that some outside judge should look at it and the judge should look at the facts alleged objectively.

Now, in analyzing these two motions of the plaintiff seeking to disqualify Judge Curtis, the basis of the February 14th motion was that the totality of his orders and rulings and statements made in connection with the matter before him in the specific litigation under consideration here demonstrate to any reasonable man a marked partiality against the plaintiff and plaintiff's counsel. And the way in which the second motion for disqualification was worded led me to believe that a motion, in effect, the moving papers led me to believe that it was a question to disqualify Judge Curtis on order No. 59 filed on April the 25th, concerning the appointment of a special Master, and that Judge Curtis had thereby conceded his inability to consider the technicalities of this case.

However, that isn't the way you argued, Mr. Irons, so I will go along—.

MR. IRONS: May I make a comment?

THE COURT: Oh, yes.

MR. IRONS: Your Honor, we filed a first motion. We filed a renewed and supplemental motion. Those are the ones I addressed and we filed another one that your Honor has just mentioned, and I did not avert to that one in my argument.

THE COURT: I thought you meant to cover that by virtue of the way you did take it up and I thought I heard you say—I thought that you were covering or saying it by shifting the impact of it.

MR. IRONS: Well, I don't want to reargue and I don't want to abandon the one you mentioned.

THE COURT: Do you want to abandon the second one?

MR. IRONS: No, I don't want to abandon anything, of course.

THE COURT: I understand your position. You were in failure to argue the second point, but you haven't abandoned it. But you want the appointment of the Master and what occurred subsequently and whether or not the Master should be disqualified to be taken up in full flow of all that Judge Curtis did in determining whether or not—

MR. IRONS: Yes, sir.

THE COURT: —his conduct showed reasonable doubt and therefore he should step down. So we will go down to your motion.

You see, you don't make the Court's work any easier by filing one motion and a supplemental to that and then a supplemental and then a supplemental, but I will address myself to your February 14th motion.

Basically, your first ground, as I understand it, was that Judge Curtis subordinated issues relating to trademark infringement and trade secret misappropriation and so forth to the patent validity issue, that it could only be assumed—and I am quoting you the precise statement—

is because of the partiality of Judge Curtis for the defendants.

I have said in close of your argument that a judge is not an umpire, and if he thinks a case should go this way instead of that—regardless of whose head the axe might fall—nevertheless, that is the way it is going to go. And in the absence of something more cogent, the mere fact that he did decide to be a judge and say that this is the way it is, that is not grounds for disqualification.

As it were, I could just qualify it right now with the patent case I have right here in this drawer, as I have said, "This is the way it is going to be tried—one, two, three—and I am not going to worry about infringement." That is one of the first things set out in a case and maybe in this one too. So that we will leave for the wind standing alone or with the rest which does not float very far in the direction that you wish even though, as you urged, that the order was without a hearing and you asked for an opportunity to be heard and you felt preliminary injunctive relief was needed and the Court didn't provide you, the plaintiff, with an adequate explanation for the ordering.

Now, as I have said before, there is no rule that says that in every case, there has to be a hearing before a judge makes a decision on any motion. And the fact that a judge doesn't feel a preliminary injunction is needed now or that something else could be done first rather than the second, and the fact that the Court doesn't explain what he bases the orders on, those standing alone or all together are awfully weak indications of any partiality on the part of the judge either way, but they are there and that is your argument—they are there.

I don't know if any of you have ever appeared before Judge Lane, but you would be lucky there if you got a kind word in explanation about his ruling. He never would have taken the time that I am taking to rule. He

just would have said the reason he gave for it—that, you know, if he didn't give any ground, it is awfully hard to appeal. They don't know the basis of your decision. Let them find out why.

Now, I don't know if it goes quite that far, but the law is clear that the judge doesn't have to give explanations for everything he does. So that's the first.

The second ground that I want to mention is that the December 1, 1976 order denied plaintiff's request for a stay pending appeal. He prejudged the preliminary injunction issue which was the second ground which I believe you stated.

Now, the judge in that order made certain statements that—I think this is the quotation—the hearing on the requested preliminary injunction were to be held on the state of the record the assumption is that it would have to be denied.

Now, there hasn't been any judge who hasn't said just exactly that same phrase in substance. He wasn't prejudging he was simply stating his analysis of the case as it then stood and a judge has the right to properly go ahead and make statements and, of course, analyze a motion before him as to what he sees on the merits and demerits underlying and on top of the motion. And the fact that he made such conclusions based upon the record before him does not mean that he has decided the case or that he is partial or impartial. All that it indicates is that he in the exercise of his judgment, reaches certain conclusions.

Now, I will advert to this just momentarily: You must always remember that what conclusions a judge arrives at if based upon the record before him with any degree of reasonable accuracy, doesn't have to be perfect; but if in the conclusions made during the course of the litigation there is any reasonable basis for that conclusion, that cannot—no matter how it hurts—that cannot be

grounds for disqualification, even under the new 455(a). And I will advert to this later.

Now, the third ground was that in the September of 1976 order, Judge Curtis stated that plaintiff's counsel had been twice informed by telephone of certain information and so on, and no such conversations ever took place and, therefore, it is incorrect; and the Court didn't explain and correct the misstatement as the orders were intended to, according to the analysis.

Now, I will state here that in the conduct of the litigation and the complexity of the papers filed as in this one here, bear in mind that indeed a judge should not be given to remember or explain the "t" that had or had not been crossed or the "i" that had or had not been dotted. If it were material as to whether or not the telephone calls had taken place, then perhaps corrections would be noted.

Now, it might be arguable on appeal that it would appear that plaintiff's counsel had all the notice in the world. Didn't the Judge say that twice he tried to call? And the Court of Appeals would hold the representation that the Judge—in the complexity of this case with a mass of motions, orders, motions, motions and orders—the Court of Appeals would say what I am about to say, that it was completely irrelevant whether or not the plaintiff's counsel was informed by telephone or otherwise. And so from that, this Court will find but a slight if any, indication of bias or prejudice on the part of Judge Curtis, even if he refused to explain or correct what is alleged to have been a mistake.

The judges sometimes say, "It doesn't make a bit of difference and I am not going to make anything more about it. I have ruled." And that is what Judge Curtis did here.

Then again it is argued that that same December 1st, 1976 order is incorrect regarding the postponement and

consent of both parties so that discovery could be conducted. Ms. Sears—is it Ms. M-s. or M-i-s-s?

MS. SEARS: I call it Miss.

THE COURT: All right. Miss Sears has very forthrightly stated the possible basis for Judge Curtis' "incorrect" statement; that flows from what I just now said concerning the third ground in the motion. And if the judge was in error, under the circumstances, the error could not be blamed upon partiality—not reasonably, in the light of the explanation of Ms. Sears.

Now, another thing he also misstated or stated incorrectly is that the discovery on the trade secret issue had exploded into impossible proportions, and there is as a matter of fact, very little. As I have listened to counsel here today, I would say that perhaps the word "impossible" was not exactly correct, but it is clear from what I have seen and what I have read from the record and what I have heard that the trade secret issue has been a very well gnawed upon bone of contention by both sides here and has resulted in perhaps not as much discovery as plaintiff feels they should have had and perhaps in more discovery than plaintiff feels that defendant should have had. But in the analysis, the balancing, of Judge Curtis to say that because he held the trade secret issue had exploded to impossible proportions, on the basis of the record here, would be making a mountain out of another small mole hill. Namely, that the use of the term "impossible proportions," in the light of the whole picture, indicates that he made that statement because of bias for the defendant and prejudice against the plaintiff. And those statements—misstatements, calling them that because the plaintiff does—taken together, I would not, as a judge who has been on the Court of Appeals many times, I would not say that would be any prejudice that would influence the Appellate Court or give the defendants an unfair advantage, nor do I find anything in there at all to indicate that that was the intent of Judge Curtis.

Then again, in the Court's December 1st order denying plaintiff's request for stay pending appeal wherein Judge Curtis said he felt it was frivolous and he set forth his conclusion that it was a maneuver on the part of the plaintiff to further delay the lawsuit and he said that the conclusion is implicit in plaintiff's suggestion that a stay might well force the defendant to settle because of their inability to further finance the litigation.

Now, first of all, I state flatly that there is nothing in any of the rules or regulations or laws that was ever intended to deny to judges of the court the same First Amendment rights enjoyed by those who are not judges of the court. Rare indeed is it, in the course of a lawsuit, that a judge doesn't, from the conduct of counsel, from the pleadings before him, from his observations of what has occurred, as a matter of fact, of what has been agreed upon, that he does not reach conclusions and he has a right to state those conclusions if they are based upon the record before him.

We are not dealing here with Judge Ritter who said, "Let's not have any conversation. Jawbone is not permitted in this courtroom. You fellows from San Francisco might as well find that out now."

And then counsel said, "Your Honor, first of all, I would like to plead to the Court some of the problems involved in responding to your order."

And then, "I don't want to hear your problems at all. I want you to deliver the documents and deliver the documents with the information in ten days from air express courier," and so on.

Some of you may remember that in Los Angeles, you have some judges who just about every so often the Court of Appeals takes off to one side and spanks in the course of handling the case before them. I have been on the Court of Appeals and one of the judges down here got solemnly spanked. It didn't change him, but he was spanked. It didn't change the result.

The Court of Appeals is firm, so that I state now that courts have the right and it was never intended by 455 (a) that courts be curtailed in stating forthrightly its own analysis of the conduct of the parties as it appears to that court under those circumstances.

Once I had a case down there in Hawaii in which I found when the plaintiff took the stand, he didn't know the meaning of the truth. And I made those specific findings and backed them up by Code number and section. Then in another case wherein the same party was supposed to be a witness, his attorney came in and said, "Your Honor, he is not here today. He just came back and he is sick." And I said, "You'll have a doctor's affidavit by tomorrow. You know the reason."

Now, a judge has every right to say that because if he has made his determination in the course of a ruling regarding any aspect of any witness' testimony before him, he is not barred from referring back in another case to a doubt, a doubt, that he had regarding the integrity of that witness. So here it is perfectly proper for a court to state that an appeal is frivolous. We do it all the time. And that doesn't mean we're partial to or biased against one side or the other, nor is a judge to be condemned for postulating as he sees the situation, based upon the facts, the suggestion that a stay might well force the defendants to settle because of their inability to further finance litigation.

That could be simply a conclusatory statement of the judge and, standing in the context of this case, certainly, and almost in any other case, would not be an indication of bias or prejudice against one side or the other but simply an analysis of that judge as he saw what was going on before him in that case, and he has a right so to state.

Certainly, recognizing always that any rule of law which a judge makes must be conditioned on the facts of that particular case for that to stand good, and so it is here.

Now it is argued that the judge set forth in the November 23rd, 1976 order, referring to what the judge said were the plaintiff's reasons that an adverse ruling in the state action in conjunction with the expensive nature of the present litigation would cause the defendants to be faced with financial ruining.

That argument was never made.

Without holding that it was or wasn't on the record, it would be simply that the judge, from what he heard, would have a right to rationalize and that he made such a statement would not indicate that he was ruling as he did because he was biased or prejudiced, but he was ruling as he did because of perhaps an error of interpretation. And, under those circumstances, this is, Mr. Irons, I told you in the beginning what is wrong with your remedy on appeal that you stated. But nevertheless, motion for disqualification is never a substitute for—and you know it. We all know it.—a substitute for taking an appeal. And you, certainly, Mr. Irons, are not reticent about taking appeals. The record here so indicates.

Now, the sixth point was that the affidavit of counsel's staff and the affidavit of the law clerk of Judge Curtis indicates that Judge Curtis' law clerk spoke to members of the law firm wanting to discuss the plaintiff's position on trade secrets, whether they wanted any further discovery procedure, whether it would be acceptable to defendants in court.

As I have indicated, every judge has their own rules regarding how much law clerks can do. But having had about 40 law clerks of varied degree of intelligence and understanding, one thing they usually don't do, they usually don't go off just completely on their own. They usually want to do something because the judge says, "Find out what their position is on this."

In other words, it is an informal discussion. It is never intended that those informal discussions shall be a

matter of record unless that disclosed from it clearly and unmistakably was of such a nature as to change a very important aspect of one party's case or the other.

Analyzing the motion on ground six regarding ex parte communications with one side or the other, standing in the posture of this case, I could not find that it created an "appearance of partiality."

And the seventh overlapped. And again, the law clerk was simply attempting to find out whether the proposal would be such that both sides and the Court would agree to it and he wouldn't. You could take an interpretation if you wanted to stretch it, Mr. Irons, that as you argued here in your motion and lumped them together in your argument, that the statement indicated that Judge Curtis had abdicated some portion of his responsibility in deciding a controverted issue in the case to his law clerk.

Now you can look at it subjectively from your standpoint and maybe arrive at that conclusion, but objectively, I take the very words of the law clerk himself. He was not going to make the decision. He was going to refer the matter back to the Court as it is done unless you have an idiot as a law clerk; and there is no indication that this law clerk was an idiot.

Certainly judges correct rulings. When the time that you have anyone as infallible as Judge Yankwich, you have genius, but only a few geniuses exist in one generation. Judges too are known to be in error. The Court of Appeals calls that to their attention often, even in small lines. But it is the custom and practice of a judge, when it has been called to his attention that he made a conclusion in error, to try to reflect it in the record. Some judges have even confessed error. I am one of those judges. One time in 1963, I decided the law should be a certain way, and after I had a lot more experience, I confessed that I was wrong in 1963, seven years later; and I didn't feel any lesser because of that.

I don't think any of the judges do unless their ego is a lot larger than that of Ritter's.

So there was no abdication of responsibility on the part of Judge Curtis indicated, as I review this record here, when he gave certain responsibilities to his law clerk.

Then again, number eight, Judge Curtis' reaction to a motion for full disclosure of off-the-record communications between defense representations and court personnel. If we are to condemn Judge Curtis because he felt the motion was outrageous, impertinent, frivolous, and contemptuous, I would not find under the circumstances, after reading six and seven, I would not find that his reaction was not impartial.

He may have felt that counsel was endeavoring to use the Court's time and efforts on something that was of no importance whatsoever insofar as the ultimate disposition of the basic problems of the case were concerned. I would not find that met as a grounds, even though if you say his words were not temperate—I would not say that they were intemperate—if you find the words were not temperate, that would not, in connection with all I have recited before, lead me to say he showed a degree of partiality for the plaintiff or the defendant or a degree of impartiality where the plaintiff is concerned.

Ground nine was just a general ground and not detailed evidence of vilifications of plaintiff or its counsel. I cannot from that find any facts—f-a-c-t-s—I cannot find any facts which are the basis upon which the Court rules to indicate from that ground that Judge Curtis was biased or prejudiced at all.

Now, when a judge finds that a motion is frivolous, that is a ruling made in the course and conduct of trial and he may pick any figure that he feels should be reasonable under the circumstances whether it is the actual cost or not. And the amount of $1,200 is not so

horrendous as to shock the conscience when a sanction of that size is imposed upon counsel of the standing that I am sure the firm of Irons & Sears has.

Now again, rare indeed is the judge that hasn't lowered the boom on counsel because counsel has done something that that judge feels under the circumstances has taken up his court's time and caused other counsel to have spent all of his effort. And if that comes as a decision based upon the record, that finding, under the circumstances, is not one to indicate partiality; it is one in which error may be claimed.

Remember Judge Kilkenny once imposed a fine of $500 because counsel persisted in delaying, so Kilkenny thought, in delaying the proceedings. It was right here in Los Angeles.

Now, some judges wouldn't have done it, but he did; and the Court of Appeals, they sustained it. They didn't dislike that simply because he thought he was delaying the proceedings.

So here, if the judge decides that a motion under the circumstances is frivolous, he has a right to say so and his saying so is not evidence of partiality. If he wants to lower the boom on counsel for filing that motion, he has a perfect right to do so, and if he is wrong, they will tell him so on appeal in the answer that comes back—"Next subject. Let's go." That has happened many times for most judges. And the conclusion of course is that there had been a marked change in the climate—that's counsel's argument—there had been a marked change or alteration in the climate of the Court since the judge's rulings in and since October of 1976.

Now I notice that counsel here would refer to the record here. It seems that almost every order filed was followed by a motion for reconsideration. Most judges don't give motions for reconsideration the time of day unless there is something new and different about the motion that was not considered, or unless the error urged

was of such materiality as to have an effect upon the ultimate conclusion of the litigation. So that if a judge refused to hear motions for reconsideration, the only recourse is to go on appeal because litigation can become involved enough without chewing the cud two or three times. A judge does not have the stomachs of a cow. He has only one. And the result is that most judges are full. They've had it. They wait until the next meal before they eat again. So I hold here that Judge Curtis perfectly and properly had a right to hold that the motion was frivolous under the circumstances, and was entitled to do as he did. We have here, you see, no basis indicated from any outside source. The only thing we are concerned with is the bias flowing in the judicial context of this case and if what was done and said by a judge in the courts of the judicial handling of the litigation, unless there is something therein which makes it as manifest as was done in the Ritter case, where there is the totality which indicates that you are not going to get a fair deal with that judge, then the motion for disqualification must fail.

Now all that is required under 144 or 455(a) of 28 U.S.C. is that the affidavit must set forth the facts and reasons, and the facts must be specific. The subjective conclusory allegations and speculations don't make up for the lack of objective facts. I am not convinced by the plaintiff's memorandum in support of his motion for disqualification that the facts set forth, the specific facts set forth, individually or collectively, are sufficient to convince any reasonable man that Judge Curtis had an underlying bias and prejudice for either side in this case.

There are a number of conclusory allegations and assumptions made in the Court's orders but that, as I said, is insufficient.

The facts and rulings themselves must show to a reasonable man the bias or prejudice in looking at what was done here. I again state that an affidavit which

alleges that in a judicial proceeding that the judge, by his rulings and his orders—now I am talking about his rulings and orders—indicated bias or prejudice, standing alone, is not sufficient unless that which was said in those rulings and orders manifest to a reasonable person that the foundation was based upon subjective feelings of bias and prejudice on the part of the judge and could not be founded upon the facts of that particular case.

It isn't alleged there are any outside sources, but you must have it squarely within the context of the case that the sum total of all of the facts alleged or any one particular has been such that an objective hearing would say only clearly was bias and prejudice in favor of one side or the other. Bias and prejudice cannot be drawn from just the bare bones of an order or of a ruling when it is shown that the order or ruling did have a basis arising out of the facts before the Court.

So insofar as the motion for disqualification based upon that first set of grounds set forth, the February 14th motion and subsequent additions thereto, which I might state are not to be favored and bear that in mind.

MR. IRONS: Yes, sir.

THE COURT: You were supposed to get one shot at the pigeon and if you miss it, you are out of the money.

Now the May 20th motion—If something new comes up that you didn't have before, that's different; but if you are supposed to put down in that first shot everything that has transpired up to the day you file that motion, then you are not supposed to have a second and third chance to keep on it because you happen to think about it afterwards.

Now I again repeat, the second ground, the May 20th motion concerns something which took place afterwards and you can file that. And then you can say and it is going to be argued later on that that is just another

indication and let's go back and take all that we had before. Maybe it wasn't that then but it may be now. And whether or not your statement regarding order No. 59, filed April 25, 1977, wherein Judge Curtis stated he felt the alleged trade secrets consisting of experimental and chemical processes were of such a nature that the Court felt he didn't have all of the expertise required, and the way he put it was that "it required some expertise which this Court does not possess."

Now that is an artfully worded statement, because he didn't say he didn't have some, he indicated that there was some that he didn't. And the inference could be that there is some that he did have.

The rule regarding Rule 53 of the Federal Rules to which you adverted, I think that maybe I will agree with you, Mr. Irons, that there are certain methods by which Masters should be appointed. Normally those are followed. In the absence of the contact which Kendrick had through his daughter and through his association with Furth in connection with some antitrust cases, I think that—knowing Kendrick myself and having had him up here before me and having him before me in one of the cases I am handling now—his reputation is high and his expertise in the area of patent litigation is considerable. And standing alone, I do not feel that his selection could be faulted.

But certainly I will agree with you, there shouldn't have been any question whenever the facts came to the attention of the judge, no matter who called it to his attention, that Kendrick was out. There is no problem about that. And because you might have felt that the judge was wanting to keep Kendrick does not indicate—because that is subjective, not factual—does not indicate to the Court here, when Kendrick was not kept, that the Judge was biased and prejudiced because you felt subjectively that he wanted to keep Kendrick. Maybe

he did, but maybe he didn't. Certainly he couldn't. I cannot even be sure that he could even if you agreed.

But you know that courts do have an inherent power to depart from the rules to appoint Masters. My goodness me, any time in any complex case that you are going into the field of economics or you are going into the field of chemical patents, where indeed is the judge who has the conceit to feel that he knows so much that he can decide a case without having a disinterested party analyze all the mass of information before him so that he can see the plus of the plaintiff's case and the minus of the defendant's case and the, hopefully, neutral analysis of each. Not that he will agree with his Master; that doesn't always occur either.

And the judge is rare indeed who says "Yes, because the Master has decided. That isn't the way it is. You know that. Whatever the Master comes out with he has to report; and what he reports, counsel can argue and tear apart and do what they please with it and then the judge makes his own decision for himself. The Master doesn't make it for him.

And so Curtis was well within his ability to appoint one, and if he subsequently decided that at that time at least he didn't care to have any Master appointed, you can't say that he was biased and prejudiced in refusing to do so.

Now, let's take a look at the law in the Ritter case because that's a very recent case. Even in that case, and that is if you have read it, you know that if I had been government counsel, I would have felt that I didn't have a chance of a snow storm in *Dante's Inferno*—I really would—before Ritter. Any time that any attorney raises an eyebrow at Ritter, this is what occurs: "The latter, that is Ritter, reacted in a characteristic manner that impugned his integrity and also that of an attorney for the defendant." And hold your hats because here we go again with Ritter: "And Judge Ritter was indeed

caustic and overbearing toward counsel for the government and this in part no doubt resulted in the filing of the motion demanding that he disqualify himself."

But the Court of Appeals said, "We have examined the colloquy of the judge and counsel and it cannot be said that the attitude displayed could in and of themselves demonstrate prejudice. It might be added that such displays are not infrequent or uncommon."

Well, that statement was wrong. They shouldn't be. While we do not condone them, they do not invariably evidence bias or prejudice against a party. Then they take their out. Sometimes, however, they might put the injudicious and partisan conduct at trial.

In viewing the facts in their totality, we continue to face the weak facts of presentation. There is no indication that Christensen acted unfairly or unethically; no basis to believe Judge Ritter's ruling favored the defendants. These rulings were in the court at the prior ruling which preceded the problem of the resolutions.

The only thing that was left was the attitude of Ritter for the attorneys for the government. And then after they wish-washed back and forth, they finally came out with—They don't think they'll finally disqualify, but think somebody else ought to try it.

I do not find in this case the acts and words or orders of Judge Curtis have such a nature to me to indicate that there is any bias or prejudice for or against either party here, nor that the sum totality of all that has been urged by plaintiff here is such that under the new 455(a) should call for his disqualification on the basis that his impartiality might reasonably be questioned. I do not find that plaintiff has met the burden of proof to show that in the sum total that his impartiality might reasonably be questioned.

The motion that Judge Curtis recuse himself or be disqualified, both motions are denied.

As much as I hate to do it in my old age, I might write a decision on this, but don't hold your breath.

(Proceedings herein of this date were concluded.)

ORDER NO. 88

ORDER DENYING PLAINTIFF'S FURTHER RENEWED AND SUPPLEMENTAL MOTION FOR DISQUALIFICATION OF ASSIGNED JUDGE

Filed November 14, 1977

Plaintiff's Further Renewed and Supplemental Motion for Disqualification of the Assigned Judge filed herein August 23, 1977, having been assigned to the Honorable Martin Pence, United States District Judge from the District of Hawaii sitting by designation of the Chief Judge of this district to hear and rule upon this motion, said motion having been fully argued and considered by the court,

For reasons fully set forth in the oral opinion of the court, now part of the record of this case,

IT IS HEREBY ORDERED that plaintiff's Further Renewed and Supplemental Motion for Disqualification of Assigned Judge is hereby denied.

DATED: Nov. 10, 1977

/s/ Martin Pence
MARTIN PENCE
United States District Judge

CERTIFICATE OF PLAINTIFF'S COUNSEL MARY HELEN SEARS

I, Mary Helen Sears, having read and considered the "Order Denying Plaintiff's Motion For Disqualification of the Assigned Judge" certify, with full cognizance of the provisions of Rule 11 of the Federal Rules of Civil Procedure, that:

1. The sentence reading

> "It is apparent from the affidavits of Ms. Sears, filed in support of this and earlier motions, that she has become angry with this court because of a series of adverse rulings which apparently have frustrated her litigation strategy."

appears to me to imply that the motion for disqualification of the assigned judge was filed by reason of my anger at the rulings of such judge rather than on the basis of professional judgment that the judge should be disqualified under 28 U.S.C. § 455(a).

2. To my personal knowledge, plaintiff's motion for disqualification of the assigned judge in the subject case was not made by reason of anger or any other emotion of mine, nor for any personal reason of mine, but rather was filed quite impersonally based on the client's desire and the professional judgment of its counsel, including but not limited to me, that the motion was and is well-founded in fact and in law.

3. Any suggestion that I would or did file or that I would or did countenance the filing of a motion to dis-

* * *

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* * *

qualify a federal judge on the basis of personal anger or any other emotion of my own is a false suggestion.

/s/ Mary Helen Sears
MARY HELEN SEARS

AFFIDAVIT OF LEON YOCHELSON

LEON YOCHELSON, being duly sworn, deposes and states:

1. I make this affidavit at the request of counsel for petitioner, Lee Pharmaceuticals, in the above-entitled proceeding.

2. I have been provided by counsel for Lee Pharmaceuticals with the following documents:

> (i) a document, 62 pages in length, entitled "Petition for Extraordinary Writ Pursuant to 28 U.S.C. § 1651 and Rule 21 of the Federal Appellate Rules of Appellate Procedure". That document, as supplied to me, is included in the envelope marked Exhibit A.
>
> (ii) a document which is entitled "Lee Pharmaceuticals v. U.S. Dist. Ct. C. D. of Cal. (Den-Mat, Inc. et al—Real Parties in Interest) EXHIBIT BOOK TO 'PETITION FOR EXTRAORDINARY WRIT', #77-1969", which document includes tabbed exhibits numbered 1 through 33. That document as supplied to me is contained in the envelope marked Exhibit B.

3. I have read the Exhibit A and Exhibit B documents which are described in paragraph 2 hereof.

4. I understand from the Exhibit A document that Lee Pharmaceuticals requests an order from this Court causing Judge Jesse W. Curtis of the United States District Court for the Central District of California to disqualify himself pursuant to 28 U.S.C. § 455(a) from sitting further in the case of *Lee Pharmaceuticals* v. *Den-Mat, Inc., et al*, Civil Action No. 75-2311 JWC, and prohibiting Judge Curtis from further participation in that case on the ground that his conduct since at least

about October 27, 1976 has been such that his impartiality might reasonably be questioned.

5. I have read the present statute 28 U.S.C. § 455(a) which provides:

> "Any justice, judge, magistrate, or referee in bankruptcy of the United states shall disqualify himself *in any proceeding in which his impartiality might reasonably be questioned.*"

and I have noted particularly the underlined portion thereof.

6. I have read what I am informed is the prior statute 28 U.S.C. § 455 which provides:

> "Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related or connected with any party or his attorney as to render it improper, *in his opinion*, for him to sit on the trial, appeal, or other proceeding therein."

and I have particularly noted the underlined portion thereof.

7. My education and experience are accurately summarized in the document marked Exhibit C and entitled "Leon Yochelson, M. D." and in the untitled document marked Exhibit D.

In addition, for at least the last 25 years, I have devoted on the order of about ten percent of my professional time to forensic psychiatric work in both civil and criminal matters, for plaintiffs and defendants and at times as an agreed-upon expert for both, in matters pending before various courts in Maryland, Virginia and the District of Columbia.

8. I have had no prior association of any kind with the petitioner Lee Pharmaceuticals or with any of its counsel.

9. I have not personally examined Judge Jesse W. Curtis.

10. In my professional opinion, the question posed by the present statute 28 U.S.C. § 455(a) of whether or not a given judge's "impartiality might reasonably be questioned" is most reliably determined by a person other that that same judge.

11. Based solely upon my review of the aforementioned Exhibit A and Exhibit B documents and having neither read nor considered any other part of the record in Civil Action No. 75-2311 JWC, it is my professional opinion that the conduct of Judge Jesse W. Curtis in Civil Action No. 75-2311 JWC is such that his impartiality might reasonably be questioned; it is my further opinion that the conduct of Judge Curtis demonstrates that he is strongly disposed against the plaintiff and its counsel.

12. In my professional opinion, based on my reading of only the papers which are Exhibits A and B, Judge Curtis has demonstrated by his conduct that he is not capable of a detached and objective determination of the question of whether his impartiality in Civil Action No. 75-2311 JWC might reasonably be questioned.

/s/ Leon Yochelson, M. D.
LEON YOCHELSON, M. D.

DISTRICT OF COLUMBIA: ss

Subscribed and sworn to before me this 13 day of July, 1977.

/s/ [Illegible]
Notary Public

My Commission Expires April 14, 1980.

Leon Yochelson, M.D.

DOB 7/23/17; Buffalo, New York
Married; Three children

* * * *

1938	B.A. in Psychology (Magna Cum Laude), University of Buffalo (SUNY)
1942	M.D., University of Buffalo (SUNY)
1942-3	Internship with emphasis on Psychiatry, St. Elizabeths Hospital, Washington, D.C.
1943	Diplomate, National Board of Medical Examiners
1943-6	U.S. Army: Australia, New Guinea, Philippines Psychiatric Ward Officer Psychiatric Consultant to 80th General Hospital (2000 beds) Rank on Discharge: Major
1946-8	Medical Officer in Psychiatry, St. Elizabeths Hospital, Washington, D.C.
1946	Licensed in Medicine and Surgery, Washington, D.C.
1948	Certified in Psychiatry by American Board of Psychiatry and Neurology. For a number of years was Assistant Examiner and Examiner.
1950	Diploma, Washington School of Psychiatry
1952	Graduate, Washington Psychoanalytic Institute

* * * *

TEACHING HISTORY

1948-64	By invitation: Washington School of Psychiatry (1951-62) Catholic University of America, School of Social Work and Department of Psychiatry and Psychology

Howard University: School of Social Work

St. John's University, Collegeville, Minnesota
Lecturer: Summer Workshops for the Clergy

University of Oklahoma Medical School—Visiting Professor

The George Washington University Medical Center

1949 Assistant Clinical Professor of Psychiatry: Chief of University Hospital Program

1955 Associate Clinical Professor of Psychiatry

1959 Professor and Chairman, Departments of Psychiatry in Medical School, University Hospital and Clinic

1965 Co-Director—G.W.U. Institute of Law, Psychiatry and Criminology

1970 Resigned Chairmanship of Department of Psychiatry and continued as Professor of Psychiatry and Behavioral Sciences, to date

Washington Psychoanalytic Institute—Training and Supervisory Analyst, 1950-1952, 1956 to date

* * * *

PRESENT PROFESSIONAL ACTIVITIES

Chairman, Professional Associates (group practice of psychiatry)

Chairman, Psychiatric Institute of Washington, D.C.

Chairman, Psychiatric Institute Foundation (non-profit research and education)

* * * *

ORGANIZATIONS

Federation of American Hospitals
Vice President

Chairman, Committee on Psychiatric Hospitals
Committee on Health Associations Liaison

National Commission on Confidentiality of Health Records
Board of Directors

Washington Psychiatric Society (charter member)

President 1964-65. Member of Council for many years

Fellow, American Psychiatric Association
Chairman, Committee on Membership, 1967-70

Medical Society of the District of Columbia

Member, Medical Ethics and Judicial Committee

Past Member:

Nominating Committee
Committee on Religion and Psychiatry
Committee on Mental Health—Chairman for many years

American Medical Association

American Academy of Psychiatry and Law, Charter Member

Medical Society of St. Elizabeths Society—Past President
American Psychoanalytic Association

International Psychoanalytic Association

Washington Psychoanalytic Society

American College of Psychiatrists, Fellow

American College of Psychoanalysts, Founding Fellow

National Association of Private Psychiatric Hospitals

Co-chairman, Committee on Proprietary Hospitals
Member, Joint Commission an Accreditation Task Force

American Association for Chairman of Departments of Psychiatry, Past Member

American Association for the Advancement of Science

* * * *

HOSPITAL AFFILIATIONS

The George Washington University Hospital

Sibley Memorial Hospital (Honorary Consultant)

Children's Hospital National Medical Center

Doctors Hospital

* * * *

CONSULTANCIES

NIMH

Social and Rehabilitation Service of HEW

V.A.

PROFESSIONAL WRITING

Editor of "Symposium on Suicide"

Consulting Editor, Journal of Life Threatening Behavior

Author of chapters in three books and of a number of articles, published in professional journals

* * * *

HONORS

Member, Gibson Anatomical Society

Member, Alpha Omega Alpha Honor Medical Society

Certificate of Appreciation, U.S. Department of HEW

Certificate of Commendation, American Psychiatric Association

Academic Lecturer, American Psychiatric Association by invitation (1963)

An Incorporator of:

The Joint Commission on Mental Health of Children

American Branch of the World Psychiatric Organization

Leon Yochelson, M.D., founding partner and Chairman of The Professional Associates, and the Boards of The Phychiatric Institute and The Psychiatric Institute Foundation, was Chief of Psychiatry at The George Washington University Hospital from 1949 and Chairman of The Department of Psychiatry of the School of Medicine of The George Washington University from 1959 until his resignation from both positions in 1970. He has continued as Professor of Psychiatry and Behavioral Science and as Co-director of the Institute for Law, Psychiatry and Criminology at The George Washington University.

Dr. Yochelson is Supervising and Training Analyst at The Washington Psychonalytic Institute, past-Vice Chairman of the Sub-Committee on Mental Health of The Public Health Advisory Council of The District of Columbia, an examiner in Psychiatry for The American Board of Neurology and Psychiatry, and post-Chairman for many years of the Committee on Mental Health of the Medical Society of the District of Columbia and is presently a member of the Medical Society's Committee on Ethics. He has also been a psychiatric consultant to the National Institute of Mental Health, the Office of Vocational Rehabilitation of the Department of Health, Education and Welfare and The Social Security and Veterans Administrations. He is a Fellow of The American Psychiatric Association and past-Chairman of its Membership Committee. He is a Fellow of the American College of Psychiatrists and a Founding Fellow of the American College of Psychoanalysts. He is past president of the Washington Psychiatric Society and a member of the Washington Psychoanalytic Society.

Presently Dr. Yochelson is a Vice President of the Federation of American Hospitals and Chairman of its Committee on Psychiatric Hospitals. He is also a member of the Board of Directors of the National Commission on Confidentiality of Health Records.

EXCERPT FROM PETITION FOR WRIT OF MANDAMUS 77-3361

Filed October 11, 1977

[Commencing at p. 18, l. 4]

* * * *

The March 4 and August 22, 1977 motions—contrary to what appears from actually reading them—were classed by Judge Pence as motions to reconsider the February 11 motion and disposed of adversely to petitioner as if one with that February 11 motion (Ex.Bk., Tab 1, p. 98, 1.13—p. 99, 1. 20). Had Judge Pence troubled to read either of them, as he obviously did not, he would have seen that each satisfies his expressed criterion for a *proper* further motion, *i.e.*, "something new . . . that you didn't have before" (*Id.*, p. 99 11. 15-16) and *neither* constitutes "a second and third guess to keep on it because you happen to think about it afterwards" (*Id.*, p. 99, 11. 19-20) as inaccurately and unfairly charged. Pointedly, (a) the February 11 motion (Ex.Bk., Tab 4) relates to facts demonstrating appearance of partiality before its date; (b) the March 4 "supplemental and renewed" motion (Ex. Bk., Tab 6) relates to new facts arising *after* February 11 and includes papers refuting the *false accusation* concerning motivation for that motion first made by Judge Curtis in his February 18 denial (Ex.Bk., Tab 5) of the February 11 motion[25] and (c) the August 22 motion (Ex.Bk., Tab 19) expressly *only* relates to *new facts occurring after* March 8.

Since Judge Pence obviously *did not* read these motions, he *did not*, in his oral opinion, comment upon any of the factual bases for disqualification under 28 U.S.C. 455(a) that each presents. Moreover, he apparently failed to

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[25] These papers are the Sears certificate and the Lee affidavit. There is simply *no way* in which petitioner, lacking occult powers as it and its counsel are, *could* have been aware of any need for either until Judge Curtis' Order No. 48 (Ex.Bk., Tab 5) was received.

appreciate the significance of—and likewise did not comment upon—the highlights of each as exposed by petitioner's counsel earlier in the oral hearing (Ex.Bk. Tab 1, pp. 171).

In consequence, Judge Pence did not really weigh *at least* the following facts in considering whether Judge Curtis is obligated to disqualify himself under 28 U.S.C. 455(a):

> (a) The indicia of emotional personal involvement and personal rancor of Judge Curtis in Civil Action 75-2311 JWC that are manifest on the face of the "Order re Plaintiff's Motion for Disclosure of All Off-the-Record Communications between Court Personnel and Defendants, the Representatives and Counsel" (Ex.Bk., Tab 21) entered February 15, 1977—hence four days *after* the filing of the original disqualification motion—including at least:
>
> (i) its charges that a proper and respectful *inquiry* about the judge's off-the-record communications and relationships were "implications" of misconduct and "claims" of an "outrageous" nature;
>
> (ii) the characterization of this inquiry as "contemptuous", "frivolous and impertinent" conduct by petitioner's counsel;
>
> (iii) the attempted deprecation of petitioner's concern about possible serious improprieties on the part of the Court and its staff, which led to the criticized inquiry, to the level of "petty personal bickering" relating only to "collateral and irrelevant matters"—which, *a fortiori*, suggests a total insensitivity of Judge Curtis toward every litigant's *right* to "A fair trial in a fair tribunal . . . a basic requirement of due

> process. . . .". *In re Murchison*, 349 U.S. 133, 136 (1955).[26]
>
> (iv) the mischaracterization of the law clerk Holliday's affidavit as indicating that the latter's *ex parte* contracts on behalf of Judge Curtis with defendants related only to procedural and informational matters when, in fact, the affidavit confesses one conversation with defendants' counsel concerning the controverted issue of how trade secret issues were to be handled.[27] The

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[26] Manifestly, litigants are not required to *assume* that the tribunal is fair and will give a fair trial, especially in face of objective contrary indicia.

If Judge Curtis *were* wholly impartial, and *if* he and his law clerk had committed no impropriety, wouldn't he have courteously revealed exactly what occurred in various *ex parte* contacts with defendants, *inter alia* by making his law clerk available to answer questions? Can any objective observer believe that a truly detached and impartial judge would vilify inquiring counsel, dub their inquiry "irrelevant" and "petty" and supply only a *partial* self-serving affidavit answer?

Note also that Judge Curtis had earlier demonstrated his disregard for fair trial and due process of law by simply casting aside established procedures mandated by the Federal Rules of Civil Procedure in favor of *his own* "unusual and innovative procedures". See Ex.Bk., Tab 71.

[27] The Code of Judicial Conduct, Canon 3A4 provides that:

> "A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him if he gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond."

Thode, "Reporter's Notes to Code of Judicial Conduct" (1973) clearly states:

> ". . . The drafting of the appropriate standard regulating *ex parte* communications proved to be difficult. *In an adversary proceeding, ex parte communications by the judge to a party or*

order appears to attempt to mislead, *e.g.*, an appellate court reviewing the matter, as well as to camouflage the acknowledged impropriety.

(b) Indicia of emotionalism, personal involvement and rancor on the part of Judge Curtis which are implicit in the false charge against Miss Sears which the judge made a part of his "Order Denying Plaintiff's Motion for Disqualification of the Assigned Judge, dated February 17, 1977 (Ex.Bk., Tab 5)—six days after the original motion was filed. Thus, to avoid any reasoned consideration of the motion,

his lawyer or by a party or his lawyer to the judge clearly should be precluded. The more difficult questions concerned such transactions as a telephone call by the judge to a law professor to obtain advice on a contested issue within the area of the professor's expertise, or consultation by the judge with another judge not on the same panel or the same court. These are not infrequent or hypothetical situations—the Committee was informed of many such communications. See the discussion of the controversy between Judges Frank and Clark over these very issues in the recent book by Marvin Schick, *Learned Hand's Court* (The Johns Hopkins Press, 1970), and Schick's article, *Judicial Relations on the Second Circuit*, 1941-1951, 44 N.Y.U.L. Rev. 938, 941-947 (1969). The Committee concluded that unless the *ex parte* communication is authorized by law—statute, common law, and rule being the principal methods of authorization—the communication should be prohibited. Communications between judges and between the judge and court personnel whose function is to aid the judge in carrying out his adjudicative duties were recognized by the Committee as falling within the 'authorized by law' provision. A judge receiving a communication about a proceeding that is not before him should, however, be aware that if the proceeding does come before him in the future, any present communication about the proceeding might require his disqualification at that future point by reason of Canon 3C(1), which provides: 'A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned . . .' A judge who has theretofore given advice about the issues in a proceeding has put his impartiality in jeopardy." (Emphasis supplied)

The type of *ex parte* communication that occurred here, which Judge Curtis order attempts to cover up by mischaracterizing the Holliday affidavit, was *clearly intended* to be ethically precluded.

Judge Curtis lashed out at Miss Sears, charging that she filed the original motion in bad faith and solely because she had become "angry" at frustration of her litigation strategy.[28]

(c) Indicia of lack of impartiality that are implicit in Judge Curtis' "Order Denying Plaintiff's [sic Motion for Retraction and Expungement" dated February 15, 1977 (Ex.Bk., Tab 22). The motion disposed of by this order, filed by counsel on February 3, 1977 (Ex.Bk., Tab 23), asks Judge Curtis, consistent with his desire expressed at the January 10, 1977 hearing "to dispel any feeling that you may have that this Court has any reluctance to decide anything in favor of the plaintiff" [29] (Tr. 42, 11. 1-3), to retract and expunge certain specifically identified

[28] This false, fabricated charge which has never been withdrawn, exemplifies the degree to which Judge Curtis consistently ignores and departs from Canon 3A3's requirement that "A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers and others with whom he deals in his official capacity. . . .".

The charge is in any event petty and unworthy of any mature adult, much less a federal judge. Experienced lawyers are accustomed to receiving both favorable and unfavorable pretrial motion decisions and do not become "angry" with courts because of such decisions. Any experienced lawyer, however, would be professionally concerned about the apparent improprieties on the part of the court in this case, that create the appearance of partiality such as the *ex parte* discussion by the law clerk of controverted issues with *one* side, scuttling of the Federal Rules of Civil Procedure and the apparent failure of the Court to base its decisions on the facts which *actually* appear on the record. Such is not, however, a matter of *personal* feeling on the part of any responsible, mature lawyer—and the accusation to the contrary degrades the judicial process, the judiciary and the legal profession to the detriment of the civilized rule of law.

[29] That Judge Curtis should have been concerned about dispelling "feeling" of the sort he defined is somewhat remarkable. Plaintiff had not articulated any such feeling to that time. The quoted statement, in all the circumstances, is a clear indication that Judge Curtis *knew* he had appeared up to that time to be disposed *against* plaintiff in derogation of 28 U.S.C. 455(a).

oral comments that reflect adversely upon the good faith and competence of petitioner and upon the competence of its counsel. Defendants opposed in a paper filed February 11, 1977 (Ex.Bk., Tab 24). Petitioner's reply brief (Ex.Bk., Tab 24-A) under local rules was due February 17, 1977 when it was, in fact, filed and was served by mail February 15, 1977 from Washington, D.C. Without even awaiting that brief, Judge Curtis, on February 15, reacted, obviously with emotion and rancor, to sign an order denying the motion and to demonstrate that his desire to "dispel" petitioner's feelings, if any, that he might be reluctant to decide in its favor was at best shallow.

(d) Judge Curtis' conduct in refusing to strike or enter sanctions against the false and reckless charge that in producing documents "plaintiff or its counsel . . . literally took and tore apart documents". (Ex.Bk., Tab 25, p.2) also gives the appearance of partiality. Defendants recognized "the gravity of" their charge (*ibid.*) but alleged that "irrefutable proof" was demonstrated by the words "tear apart" appearing on two pages. Plaintiff, on or about February 3, 1977, filed a motion to strike these charges and for sanctions accompanied by a personal knowledge affidavit of its president, Henry L. Lee, Jr. that the words "tear apart" refer to a practice at plaintiff's predecessor of taking one copy of all research reports apart by subject matter for filing in separate subject matter files and that there was no document tampering in connection with producing documents in the litigation.[30] Defendants' opposition does not even attempt to refute these facts but raises a plurality of new points never before urged, based on an attached affidavit of their coun-

[30] The motion and all supporting papers appear at Ex.Bk., Tab 26.

sel, Arthur Martin, who was *not* present at the document production and inspection, and has no personal knowledge thereof.[31] Without benefit of petitioner's timely served and mailed reply brief (Ex.Bk., Tab 28) the judge entered an order (Ex. Bk., Tab 29) denying the motion and thus signified that he did not believe the Lee affidavit but *did* believe defendants' reckless and false charges.[32]

(e) The various facts set forth in the affidavit of petitioner's president, Henry L. Lee, Jr., executed March 4, 1977 (Ex.Bk., Tab 6) which demonstrate the feelings of apprehension that Judge Curtis' conduct aroused in Mr. Lee as to his bias against the plaintiff and the improbability—if not impossibility —of fair hearing on plaintiff's case before Judge Curtis.[33]

(f) The indicia of insensitivity to truth, emotional rancor against petitioner and its counsel and abnormal personal concern for preserving his continued right to sit in Civil Action 75-2311 implicit or explicit in at least the following *post*-March 8, 1977 events and occurrences:

[31] These papers appear at Ex.Bk., Tab 27.

[32] Defendants' opposition was served by mail and filed on February 15, 1977, having been served by mail on February 11, 1977. Under apposite local rules, petitioner's reply was due February 18, 1977 and was mailed on February 15 and filed February 18. The denial order however is dated February 17.

[33] Some of these facts are repetitive of those raised in petitioner's February 11, 1977 and March 4, 1977 memoranda on disqualification; others are not. All are presented in the context of Mr. Lee's view of matters as officer and director of the petitioner corporation.

Importantly, in view of the colloquy at the hearing before Judge Pence (Ex.Bk., Tab 1, p. 55, l. 25 to p. 57, l. 12) it is emphasized that Mr. Lee personally directed the *content*, albeit not all of the language, of his affidavit and stands ready to be cross-examined on his beliefs and impressions there recorded, and the manner in which they are recorded, should the Court so desire.

(i) On two occasions Judge Curtis incorrectly stated in substance that the only basis for disqualification advanced by petitioner was the fact that he had made motion rulings adverse to plaintiff—*to wit*, in the Memorandum to Chief Judge Stephens (Ex.Bk., Tab 14) and in Order No. 84, entered August 15, 1977 (Ex.Bk., Tab 30). As the various supporting papers clearly show and as even Judge Pence seemingly acknowledged (Ex. Bk., Tab 1, p. 73, l. 19 to p. 74, 1.7) the motions to disqualify do *not* rest on motion *rulings* but upon Judge Curtis' manner of making such rulings, and his attitude toward petitioner and its counsel.[34]

This effort by Judge Curtis to distort the record and promote a result whereby he continues to sit clearly demonstrates his unseemly *personal* attachment to the case and his determination to insure that *he* masterminds its outcome.[35]

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[34] It is petitioner's position that—disregarding altogether the outcome of the motion rulings—the record shows a series of occurrences which, taken singly or together, demonstrate that Judge Curtis has such an insensitivity toward truth, ethics and simple fairness, such an inability to behave in a calm, detached, impersonal and impartial manner, such a marked disposition to treat petitioner and its counsel with discourtesy, impatience, skepticism and personal emotion and such lack of respect for established procedures and usages of law, including both federal and local rules of procedure that he is obligated to disqualify himself under 28 U.S.C. 455(a).

See the discussion of precedent which recognizes this as a *proper* basis for disqualification under § 455(a) under Reason 1, *infra* p. 58, and note that the essential purpose of the statute is to increase public confidence in the integrity and impartiality of the judiciary so that *all* litigants will feel that they are receiving justice in the courts.

In this case, petitioner already *knows* that there is *no way* in which it could under *any* circumstances, receive a fair hearing at the hands of Judge Curtis.

[35] Would not an impartial and fair judge acknowledge and face squarely up to the *real* reasons advanced for his disqualification?

(ii) On March 29, 1977, Judge Curtis denied an unopposed motion by plaintiff's counsel to strike a charge of "contemptuous" conduct or alternatively hold a contempt hearing under Federal Rule of Criminal Procedures 42(b).[36]

The *merit* or *demerit* of this order is the subject of Appeal No. 77-2054, now pending in this Court. The language of the order, however, including its repetition of a charge of "frivolous, contemptuous and impertinent" conducted by petitioner's counsel, its new charge that Miss Sears acted in a "clearly contemptuous" manner and its concomitant sophistry that a contempt hearing would be inappropriate because "plaintiff's attorney has not been charged with contempt" are all indicative of Judge Curtis' inability, due to the degree of personal involvement he has allowed himself therein, to render any fair and impartial decision on *any* subsequent phase of Civil Action 75-2311 or to treat petitioner's counsel, in the "patient, dignified and courteous" manner required by the Code of Judicial Conduct.

(iii) This inability is further pointed up by the post-March 8, 1977 occurrences relating to pending Appeal 77-1984. This collateral appeal by plaintiff's counsel from an order imposing a $1,200 fine (Ex.Bk., Tab 33) on plaintiff's counsel challenges the *merit* of the order. Judge Curtis, however, even while acknowledging that the appeal is properly taken and a matter of right, refused to stay payment of the fine (Ex. Bk., Tab 34), refused to set a supersedeas bond (Ex.Bk., Tab 35) and did so reluctantly and

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[36] The order appears at Ex. Bk., Tab 31; the motion and supporting papers at Ex. Bk., Tab 32.

grudgingly only after this Court strongly suggested in response to a motion filed here by the appellant counsel, that he do so. In his order setting the supersedeas (Ex.Bk., Tab 35)—in an amount *double* the fine—Judge Curtis again reveals his emotional and rancorous disposition *against* petitioner and its counsel by slurring their good faith and competence. Thus, Judge Curtis accuses such counsel by innuendo of inducing *this* Court to prod him into granting supersedeas by concealing his Order No. 64 (Ex. Bk., Tab 35) from it—an egregious and false accusation.[37] Secondly, Judge Curtis unnecessarily expresses, in a blatant effort to prejudice the appellants in this Court, notwithstanding their irrelevance to the matter before him, his own unsolicited opinions,

> (1) that although the order appealed from (Ex.Bk., Tab 33) was posited solely and deliberately on Local Rule 3(k), "Local Rule 3(i) was equally applicable"—a statement seemingly calculated not only to prejudice appellants in this Court's eyes, but to influence and strengthen defendants' briefing on appeal;[38]

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[37] The innuendo is, specifically,

> "the circuit court's order makes no reference to this court's Order No. 64, filed May 4, 1977. It is unclear whether the circuit was aware of this order when it remanded the case."

Whether Judge Curtis *knew* this implicit accusation to be false is uncertain and petitioner does not represent that he *did* actually know it. Petitioner's point is that an impartial judge—and one conscious of his ethical duty under Canon 3 A 4—would *not* have recklessly made the charge.

[38] Actually defendants' initial invitation to rely on Local Rule 3(i) was *rejected* in the order appealed from, so that defendants must be presumed clearly aware of the rule in any case—with the obvious

> (2) that the $2400 amount of the supersedeas is based on "plaintiff's litigious propensities"—an uncalled for and unexplained implication that the bounds of proper advocacy have somehow been overstepped, clearly intended to prejudice appellants in this Court;[39]
>
> (3) that "in this court's view . . . the appeal is frivolous and . . . filed for the purpose of thwarting this court's efforts to move this case toward its ultimate determination with a minimum of delays and unnecessary procedures"—an almost irrationally emotionally charge which necessarily betrays the fact that Judge Curtis' state of mind is such as to create an untoward appearance of partiality. Thus, there is *no way* in which grant of supersedeas in No. 77-1969, a collateral appeal, *could* or *would* delay No. 75-2311 below and hence the appeal could *not possibly* have such a "purpose". Any calm and detached judge would surely so realize and would not have advanced such a baseless and unreasoned charge.[40]

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inference being that the judge sought mainly to influence this Court unfairly and to express his emotional sympathy for defendants.

[39] Any fair review of the *whole* record would show defendants to be at least equally, if not more "litigious" than plaintiff—and it *is*, after all, a trial lawyer's job to be "litigious" in presenting his client's proper case. Such is, indeed, the very essence of the adversary process—and it becomes particularly incumbent upon *counsel* to insure that a client is not victimized by rulings that are contrary to fact or law or both, are arbitrary or unfair, or otherwise improper, where the judge appears less than detached and impartial.

[40] It is also significant that the case is woefully *unready* for "ultimate determination" on *any* issue and will remain so, just as long as Judge Curtis persists in denying both sides an opportunity

(iv) On April 22, 1977, Judge Curtis entered Order No. 56 "denying plaintiff's motion to preclude voluntary in camera submissions to the court" (Ex.Bk., Tab 37). The denial states:

> "This motion is improper, for the issue of propriety of submitting documents to the court for in camera submission can only arise as a part of the court's consideration of demands for specific documents and objections thereto. This motion standing by itself makes no sense."

This adverse reflection upon the good faith and competence of plaintiff's counsel is unmerited. Regardless of whether the motion *per se* should have been granted or denied, there *was* good ground for seeking a ruling as the plaintiff's moving papers (Ex.Bk., Tab 38) clearly show. Pointedly, defendants had earlier flatly threatened in their "objection to plaintiff's various discovery requests" (Ex.Bk., Tab 39) that "Defendants will not produce to plaintiff or its counsel" certain documents, but "Rather . . . will make an *in camera* submission to the Court". The motion on its face sought to fore-

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to pursue proper discovery on the basis of "unusual and innovative" abrogation of *all* the discovery rules. A full year has now ensued with no meaningful progress whatever toward "ultimate determination", in preponderant part attributable to the continued discovery freeze and the inability or unwillingness, as the case may be, of Judge Curtis to exercise proper supervision over the few inadequate discovery attempts he *has* permitted.

Plaintiff is *at least* as eager as defendants or Judge Curtis, and probably far more so than either of them, to move the litigation forward to a *fair* trial before a *fair* tribunal. The fact is, however, that *no possibility* of such a fair trial exists so long as Judge Curtis continues to preside—or his unorthodox procedures *de hors* the rules continue to be followed.

stall this activity and was neither improper nor nonsensical, as charged.[41]

(v) In Order No. 58 (Ex.Bk., Tab 40), Judge Curtis attacked plaintiff's motion to compel production of documents as to which defendants claimed a "work product" privilege under certain classifications WP-3 and WP-4 [42] as "totally improper and a flagrant violation of Local Rule 3(k)" because he had already entered Order No. 51 (Ex.Bk., Tab 41) denying production of the same documents. But the motion (Ex.Bk., Tab 42) attempts to call attention to and refute errors of law first manifested in Order No. 51 and hence could not have been brought until after entry of the latter—and the testy reflection upon petitioner's counsel's good faith and competence is unwarranted and unnecessary to the ruling.

(vi) In contrast, Order No. 60 (Ex.Bk., Tab 43), *grants* the defendants' May 2, 1977 oral request (Ex.Bk., Tab 44, p. 42, 11, 21-23) for reconsideration and vacation of those aspects of the November 2, 1976 order (Ex.Bk., Tab 45) that require defendants to respond to certain of petitioner's discovery requests. Conspiciously, however, Order No. 60 does not refer to defend-

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[41] Even *if* this attack upon plaintiff and its counsel *could* be attributed to carelessness, inattention or overwork, rather than rancor and malevolence, it certainly demonstrates that Judge Curtis' "impartiality might reasonably be questioned" (28 U.S.C. 455(a)) by anyone observing his conduct and hence that he *should* disqualify himself.

[42] These classifications refer to defendants' counsel's communications to and from neutral third party entities such as clerks of courts, counsel who have opposed plaintiff's counsel Irons & Sears in other cases, libraries, government agencies and the like. The whole matter, like others of the matters discussed under this heading, was argued to Judge Pence (Ex.Bk., Tab 1 p. 39, 1. 23 to p. 43, 1. 3) but ignored in his bench opinion.

ants' rehearing request or to defendants' failure to comply with Local Rule 3(k) in making it, and thus constitutes further factual demonstration of Judge Curtis' double standard approach which creates *at least an appearance* of partiality.[43]

(vii) Order No. 66 (Ex.Bk., Tab 46) vacates Order No. 59 (Ex.Bk., Tab 47) because petitioner "objected specifically to the appointment of Elwood S. Kendrick". The implication is that the objection was obstructive or obstreperous. In fact, Judge Curtis had *no* choice but to excuse Mr. Kendrick, with or without objection, in view of the facts first revealed to petitioner by the court and defendants on May 2, 1977 (Ex.Bk., Tab 44, pp. 4-8) and (1) his daughter is employed by defendants' counsel Furth, Fahrner and Wong—making disqualification of Mr. Kendrick mandatory and nonwaivable under 28 U.S.C. 455(b)(5)(ii) and (iii) and (2) he himself currently acts as co-counsel with Mr. Furth in several class actions in which his specific clients are on the same side as Mr. Furth's —making his disqualification under 28 U.S.C. 455(a) appropriate, and, albeit theoretically

[43] One effect of Order No. 60 which Judge Curtis *must* have recognized, based on Ex.Bk., Tab 44, pp. 44-47, was to vacate without cause all of the third party subpoenas and deposition notices petitioner had been forced to file to obtain the WP-3 and WP-4 documents in third party hands and hence to preclude access of petitioner thereto. Since petitioner's counsel had undertaken *not* to appear in person and *not* to have the witnesses questioned, but only to procure the documents, defendants could not have been even slightly inconvenienced if these proceedings had gone forward. Judge Curtis *knew* this also (Ex.Bk., Tab 44, p. 46, 11. 8-22). The only reasonable inference is that he *wanted* to prevent petitioner's access to these *un*privileged documents—and there can be *no reasonable explanation* for such a desire except malice toward petitioner or partiality toward defendants.

waivable under 28 U.S.C. 455(e), actually and ethically nonwaivable because of the most recent amendment by the Judicial Conference of the United States to Canon 3D of the Code of Judicial Conduct."

(viii) Order No. 72, filed May 26, 1977 (Ex. Bk., Tab 48) demonstrates a disposition against petitioner of long duration. It premises its ruling at least partially upon an assertion that in a recently filed pleading "plaintiff *now* contends that defendants have already been supplied with the details of the claimed trade secrets and all supporting documents. (Emphasis added). In fact, petitioner *first* so contended on September 24, 1976 (Ex.Bk., Tab 49, p. 34, especially note 10) and repeated this contention whenever it got an opportunity, including in at least its motion to reconsider (Ex.Bk., Tab 50), the October 27, 1976 "Order Re Trade Secret Discovery" (Ex.Bk., Tab 51), its counsel's November 11, 1976 letter (Ex.Bk., Tab 52) seeking a hearing, and its original disqualification motion (Ex.Bk., Tab 4, p. 27 of supporting memo). Judge Curtis' belated acknowledgement of this frequently voiced contention is either an indication that he did not read petitioner's many earlier papers and has been whistling in the dark for many months to petitioner's detriment, or else that he *deliberately* avoided acknowledging what he knew to be the fact for many

[44] A disinterested observer would surely question in the circumstances why Judge Curtis adverted in Order No. 66 to petitioner's proper, but immaterial, objection at all under these circumstances, much less gave it as the *reason* for vacating the appointment. Petitioner is unable to offer a suggested answer other than Judge Curtis' pronounced rancor toward petitioner which prompts him to endeavor to make it and its counsel *look* bad at all times.

months because it was inconsistent with his own preconceptions. Either way, he *appears* lacking in impartiality as a result. This incorrect statement creating a false impression is repeated in Order No. 80 (Ex.Bk., Tab 53) which also charges falsely that petitioner "thwarted every effort of the Court" [45] to obtain a disclosure of its trade secrets. Petitioner in its "Motion in Response to Order No. 81" (Ex.Bk., Tab 55, Mot. p. 4, par. f) asked that the court supply evidence to support these findings or strike them. In Order No. 83 (Ex.Bk., Tab 56) Judge Curtis *ignored* and hence *sub silentio* denied, this request—thereby again showing both his disposition against plaintiff and that it is so intense that he would rather leave untruths standing in derogation, *inter alia*, of his judicial oath (28 U.S.C. 453) and at least Canons 2A and 3 of the Judicial Code, than apologize, confess error or otherwise run the risk of humiliating himself in any way.

(ix) In Order No. 74 (Ex.Bk., Tab 56) he charged petitioner with being "largely responsible for" a certain "six day delay" in the teeth of papers *then* before him (Ex.Bk., Tab 57) which show that:

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[45] Order No. 66, filed May 12, 1977 (Ex.Bk., Tab 46), is the *first* effort ever made. It was replaced by Order No. 72 (Ex.Bk., Tab 48) and the latter, in its turn, was extended by Order No. 80 (Ex.Bk., Tab 53) with which petitioner timely complied. The *only* opportunity Judge Curtis had to make such an "effort" at an earlier date was *rejected* by his denial of defendants' September 1976 Rule 37 motion in an order dated November 2, 1976 (Ex.Bk., Tab 54). From that date until the abortive appointment of Mr. Kendrick in Order No. 59 (Ex.Bk., Tab 47) Judge Curtis *made no efforts* of any kind concerning the disclosure of trade secrets. His charge that petitioner "thwarted" his non-existent efforts again indicates his animus.

(1) Order No. 63 (Ex.Bk., Tab 58) requires defendants to "file and serve" certain information "within two weeks" of its date.

(2) In lieu of compliance, defendants' counsel Martin advised that documents containing the information would be available for inspection in his San Francisco office on May 16, 1977. To avoid a special, inconvenient and expensive trip to California, petitioner's counsel asked on May 10, 1977 that the documents be copied forthwith and forwarded to them in Washington, D.C.

(3) In lieu of compliance with the request, defendants' counsel started an extraneous controversy about whether the cost of copying should be 10 or 15 cents per page and did so—not by informal telephone call or letter—but by formal pleading mailed May 16 and received in Washington, D.C. on May 19, 1977. *Defendants' counsel thus deliberately delayed past the May 17 deadline.*

(4) Plaintiff's counsel acceded by telephone on May 20, to the defendants' insistence on a 15 cent per page rate—as they would have done much earlier if *then* advised of defendants' demand. The documents essential to petitioner's compliance with Order No. 63 were hence received six days late, necessitating the extension of time which Order No. 74 grants,[47] while

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[47] In *this* instance, in other words, the ruling was not "adverse" but favorable to petitioner—yet Judge Curtis clearly demonstrated his disposition *against* plaintiff.

unfairly and incorrectly criticizing petitioner for the delay.

(x) Order No. 75 (Ex.Bk., Tab 59) entered June 2, 1977 asserts:

> "It is only under unusual circumstances that this court would deny a party the right to be heard orally on motions of this kind. There are, however, unusual circumstances in this case. In this court's view, this motion has been filed for the sole purpose of disrupting this court's efforts to move this case along toward some ultimate conclusion. This court is fully informed as to all the matters set forth in the motion, and oral argument would be neither necessary nor helpful."

The *assumption* that petitioner and its counsel acted in bad faith in filing the motion is symptomatic of Judge Curtis' bile. An objective look at the record by a competent, fair and unbiased tribunal, will show further that Judge Curtis has made *no* meaningful efforts "to move" Civil Action 75-2311 toward a *fair* and proper "ultimate conclusion". Discovery has been frozen since December *17*, 1975 (Ex.Bk., Tab 60), five months after the original complaint was filed—a remarkable circumstance in a case involving at latest count 3 patents, 5 trademarks and 18 trade secrets, plus various allegations re unfair competition, antitrust violations, etc., some not pleaded until after the freeze was imposed—and has since been permitted only with leave of court which has been grudgingly and exceedingly sparingly granted.[48]

[48] The existence of the freeze has been reiterated many times including in orders dated January 12, 1976 (Ex.Bk., Tab 61), Nov. 1, 1976 (Ex.Bk., Tab 54) and May 2, 1976 (Ex.Bk., Tab 43).

As a result there has been virtually *no* discovery since December 17, 1975 and *petitioner*, at least, is far from ready for trial.[49] Moreover, Judge Curtis seems determined to avoid trial and to dispose of Civil Action 75-2311 in some unorthodox summary fashion, as evidenced, *inter alia*, by his virtual direction in Order No. 60 (Ex.Bk., Tab 43) that defendants attack petitioner's patents on summary judgment even though discovery is far from complete.[50] In short, the implication that there *is* some realistic possibility of impending "ultimate conclusion" is itself a false pretense which colors the record in a way that reflects badly on petitioner.

(ix) Order No. 81 (Ex.Bk., Tab 63) departs from the procedures postulated by Order No. 60 (Ex.Bk., Tab 43) in that it grants a motion by defendants to reconsider the obligation to file a statement of their trade practices[51] imposed by Order No. 80 (Ex.Bk., Tab 53) *without* affording petitioner an opportunity to be heard and places petitioner under an order to show cause within one week why any further information as to such trade practices "is needed", and the

[49] It is doubtful that defendants are, or could be, anywhere near ready for trial either—but equally doubtful they will so admit, since retention of Judge Curtis is essential to defendants' preservation of the unprecedented procedural advantages he has bestowed upon defendants to petitioner's detriment. Indeed, it seems certain that, even proceeding on a totally unready basis, defendants could be confident that any "ultimate conclusion" Judge Curtis engineered or masterminded would be in their favor.

[50] Despite first representing such a motion would be filed "about six weeks" from May 2 (Ex.Bk., Tab 44, p. 42, 11. 10-13) and later by August 1 (Ex.Bk., Tab 62), defendants have yet to produce any such thing. Judge Curtis, however, has offered no criticism of defendants on this or any other point.

[51] The motion and supporting papers appear at Ex.Bk., Tab 64.

reason why plaintiff's statement of trade secrets "should not now be released to defendants' counsel". Here again, the double standard which implies at least the *appearance* of partiality on Judge Curtis' part was clearly in effect. Defendants' excuse for not filing a trade practices statement—as set forth in the testimonial affidavit of their counsel Arthur Martin, filed in violation of DR 5-101 and 5-102—asserts that defendants produced all relevant documents and that they fully describe defendants' trade practices.

As shown in petitioner's papers "in response to Order No. 81" (Ex.Bk., Tab 55), the truth of this affidavit is highly suspect, since (1) its claim of full document production is inconsistent with defendants' vigorous objection to such full production in the trade practices area (e.g. Ex.Bk., Tab 44, p. 26, l. 21-p. 27, l. 3) and subsequent "interpretation of Order No. 63" (Ex.Bk., Tab 65) that certain of such documents need *not* be produced (Ex.Bk., Tab 66); (2) the documents themselves do not render it clear whether or not full production has been made so that petitioner *should* be afforded the statement by defendants required in Order No. 80 and discovery in order to get at the true facts; (3) the affidavit is demonstrably false and misleading in its use of artificially truncated quotations from prior statements of petitioner's counsel to trump up a false charge that such counsel misled the district court, and (4) petitioner has *no reason*, based on facts that *are* known, even to believe that defendants' trade practices are *all* contained in documents.

Judge Curtis effectively paid little or no attention to petitioner's response (Ex.Bk., Tab 55) to

his show cause order (Ex.Bk., Tab 63). In his Order No. 83 (Ex.Bk., Tab 67) he asserted that:

> "Plaintiff filed a 'Motion in response to Order No. 81' on July 20, 1977. This motion largely fails to respond to the relevant issues. Plaintiff challenges several portions of the Martin affidavit which were irrelevant to the question of the trade processes.[52] Plaintiff also makes the point that the court has not permitted full discovery on all of the trade secret issues and that some of the documents identified in the affidavit were not produced in response to a trade secret discovery request.[53] These points are simply irrelevant. The only question is whether plaintiff actually has the documents specified by Mr. Martin; how plaintiff got them is

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[52] This separation of the Martin affidavit into "portions", with the obvious purpose of *saving* the bits relied upon by Judge Curtis, is so contrary to the established principles and usages of law and equity as to raise a reasonable question as to his impartiality—the more so in face of the record as herein discussed which demonstrates that Judge Curtis is not given to leaning over backwards, as he obviously did in this instance, to take a generous, or even charitable, view of any request *by petitioner* for relief.

[53] This is a distortion of petitioner's points, which were that (a) it should not be relegated to the challenged Martin affidavit but should *now* be permitted discovery on the completeness of the document production and (b) whether "some of the documents [categorically] identified in the affidavit" have been produced at all is a matter of serious question, particularly in view of defendants' position paper on Order No. 63 (Ex.Bk., Tab 66).

The distortion at least raises a question as to Judge Curtis' impartiality, since he could *not* without such an intentional distortion, have conveniently concluded, as he did, that "plaintiff has not contended that the specified documents are not in their possession, or that they do not contain the information Mr. Martin claims they do" but would have *had* to recognize that plaintiff-petitioner did raise a *serious question* tantamount to challenging both contentions.

without significance.[54] It is also irrelevant whether plaintiff has every shred of paper in defendants' possession which refers to any trade process.[55] Defendants' counsel has stated under oath that every trade process is fully disclosed in the documents that have been produced."

(xii) Order No. 83 (Ex.Bk., Tab 67) postulated a procedure for hearing and determining petitioner's April 7, 1976 preliminary injunction application wholly at variance with the motion for evidentiary hearing to which that application was attached.[56] Petitioner concluded that under the strictures imposed by the protective order entered September 8, 1975 (Ex.Bk., Tab 69) and the factual setting of the issues it would not have a fair chance to present its case for a preliminary injunction using the procedure Judge Curtis defined in Order No. 83. Accordingly, it

[54] Plaintiff, of course, did not raise an issue of "how" it got the documents in issue; its moving papers seriously questioned "*whether*" it had been given *all* pertinent documents. Again, the seemingly intentional distortion is significant because it symptomizes *at least* an *appearance* of partiality on the part of the judge.

[55] This conclusion of irrelevancy is necessarily based on the next succeeding sentence which accepts the "relevant" Martin affidavit averments as true, even though "irrelevant" challenged portions of the same affidavit were shown to be false. Such convoluted mental manipulations are not rationally explainable except in the context of an appearance of partiality. Absent partiality, why would a judge strain to reach an illogical result or to so distort petitioner's papers (Ex.Bk., Tab 55) as to force them to coexist with that illogical result?

Moreover, the contrast between Judge Curtis' reluctance to question the Martin affidavit, notwithstanding petitioner's demonstration of the falsity of some statements therein and his unwillingness to accept *any* fact statement, sworn or unsworn, proffered by plaintiff is striking—and *per se* creates an appearance of partiality.

[56] The whole package as filed appears at Ex.Bk., Tab 68.

filed a "Response to Order No. 83" indicating its intention not to press the preliminary injunction under these and other circumstances of Civil Action 75-2311. Petitioner did so in the good faith belief that defendants and Judge Curtis were entitled to know its decision timely and that defendants particularly would be saved unnecessary effort in preparing written arguments *against* a preliminary injunction that plaintiff—deprived of the type of hearing deemed essential to proper presentation of its case[57]—did not intend to press via written arguments in the manner defined by Order No. 83. The result was an intemperate attack upon petitioner in Order No. 84 allegedly "Rejecting Plaintiff's Objections to Order No. 83" (Ex.Bk., Tab 30). Judge Curtis therein accuses petitioner of "refusal to obey the orders of this court", and of making a "totally false" contention as to severance of trademark and unfair competition issues from trade secret issues. But the court could not "order" anyone to seek or support a preliminary injunction, and Judge Curtis betrays his animus against petitioner by levelling an emotional and unwarranted accusation of "refusal to obey . . . orders" at a simple election, made as a matter of right, to forego proceeding further since the type of hearing petitioner actually sought and deemed necessary to its presentation of its case was not to be available.

[57] For example, Order No. 83 would allow oral testimony *only* if petitioner first shows who it desires to call, why this is necessary and "the subject matters they expect to question [adverse witnesses including some of the defendants themselves] on". The net result—to allow adverse parties whose veracity is highly suspect to tailor their answers in advance so as to avoid any revelation of the true facts at the hearing—*a fortiori* deprives petitioner of a fair chance to present its case for preliminary injunctive relief.

The charge of "totally false" contention likewise betrays animus. Order No. 83 (Ex.Bk., Tab 30) says *nothing* anywhere about trademark and unfair competition issues and suggests "the primary area of controversy will involve the question of whether or not plaintiff's claimed trade secrets are entitled to injunctive protection as bona fide trade secrets." Petitioner's expression in good faith of its understanding of Order No. 83 could not have been charged with "total falsity" by a detached, emotionally uninvolved judge.

[ending at p. 42, last line]

* * * *

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

U.S. Court of Appeals and Post Office Building
7th & Mission Streets, P.O. Box 547
San Francisco, California 94101

August 3, 1977

Edward S. Irons, Esquire
Irons & Sears, P.C.
Attorneys at Law
1801 "K" Street, N.W.
Washington, D.C. 20006

Re: Lee Pharmaceuticals v. U.S. District Court for the Central District of California No. 77-1969

Dear Mr. Irons:

Thank you for your letter of July 29 in reference to the order of this court, filed July 26, 1977 in the above-captioned case.

In answer to your first question, no, you will not be provided with a signed order. It is not the practice of this court to provide the signatures of judges on every order filed. Your reference to the Motion Calendar of 7/5/77 indicates that the original petition for writ of mandamus went to the motion panel of that date. This is properly shown on the initial order signed by Judges Ely, Hufstedler and Chambers, filed July 12, 1977, denying the petition.

The second question is answered in the affirmative, the request for reconsideration was considered by the same three judges on the Motion Calendar of 7/5/77. Motions panels consider matters in chambers without benefit of

oral argument. If a request comes in for reconsideration, the judges communicate by phone, and the decision to either deny or grant is done at that time. In the instant case, the order of July 26, 1977, was filed pursuant to a signed certificate from Judge Hufstedler, attached to the order with the following language "All of the judges concerned concur in the within order. The Clerk will please file it."

U.S. Circuit Judge

It is the procedure of this court, due to judges being in areas other than San Francisco, to file opinions, memorandums and orders with such a certificate. This certificate is always attached to the original document and kept in our permanent file. Under no circumstances are we permitted to release photo copies of the certificate. However, no one is precluded from looking at the certificate in this office.

I trust that this information will be helpful to you.

Sincerely yours,

/s/ Emil E. Melfi, Jr.
EMIL E. MELFI, JR.
Clerk of Court

EEM:grh

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GENERAL ORDERS OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT

General Order No. 4

Processing of Applications for Writs of Mandamus Prohibition and Other Extraordinary Writs Other than Habeas Corpus

Applications for writs of mandamus, prohibition and other extraordinary writs, whether addressed to an individual judge or to the Court, shall be deemed addressed to the Court unless, for emergency reasons, it is necessary for an individual judge to act thereon. Upon the filing of such an application, it shall, unless for emergency reasons an individual judge should act thereon, be immediately referred to a panel of three judges.

Pursuant to Rule 21(b), Federal Rules of Appellate Procedure, the panel shall first determine, ex parte, whether the subject matter is appropriate for writ procedure. If the panel determines that the subject matter is not appropriate for writ procedure, it shall deny the application forthwith, subject however to a petition for reconsideration. Such summary denial shall not be regarded as a decision on the merits. If the panel shall determine that the subject matter is appropriate for writ procedure, it shall order that an answer to the application be filed by the respondents within the time fixed by the order, and further proceedings thereon shall be had as provided in Rule 21(b) of the Federal Rules of Appellate Procedure.

If, by reason of emergency, it is necessary that such an application be first brought to the attention of an individual judge, he shall not deny the application, but may order that an answer be filed, all further proceedings to be had before a panel.

A panel or an individual judge may, in the event an order is entered calling for an answer, enter a stay order to the extent authorized by applicable rules and statutes.

* * * *

Note: At the Warner Springs meeting, on February 23 and 24, 1968, it was the general view that a General Order should be promulgated governing internal procedure in such matters. Such procedure will replace our present "Leave to File" procedure but has about the same effect.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1073

LEE PHARMACEUTICALS,
Petitioner,

vs.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,
Respondent,

DEN-MAT, INC., ROBERT L. IBSEN, W. RICHARD GLACE, FRED H. BROCK AND PROFESSIONAL PRODUCTS CO.,
Real Parties In Interest.

Brief of Real Parties In Interest in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Real Parties In Interest.

Brief of Real Parties In Interest in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Real Parties In Interest Den-Mat, Inc., Robert L. Ibsen, W. Richard Glace, Fred H. Brock, and Professional Products Co. herein oppose the Petition for a Writ of Certiorari.

The instant Petition arises out of the same fact circumstances as, and connects directly with, a prior Petition, No. 77-259, dismissed under this Court's Rule 60 on October 31, 1977, ... U.S. ....., 54 L.Ed.2d 295, which prior Petition involved the same petitioner, the same respondent, and the same real parties in interest. The instant Petition seeks, as No. 77-259 sought, the disqualification of the Honorable Jesse W. Curtis, United States District Judge for the Central District of California, from further participation as the assigned trial judge pursuant to 28 U.S.C. § 455(a).

JURISDICTION

Real parties in interest respectfully suggest that this Court lacks jurisdiction over the entire subject matter of the instant Petition as a direct consequence of petitioner's unqualified and unequivocal repudiation, before this very Court, of the procedures followed in the District Court. Thus, in Petition No. 77-259, filed August 31, 1977[1], petitioner herein stated:

> "The procedure suggested by the respondent judge's July 20, 1977 memorandum [Appendix ("App."), at 7a-8a] has no formal status, finds no sanction in any rule or statute including [28 U.S.C.] § 455 and hence, *can never result in any action of any meaningful nature.*" Pet. No. 77-259, at 12, n. 8, ¶ 3 (emphasis supplied).

Real parties in interest further respectfully submit that this Court lacks jurisdiction over the second "question" "presented" by petitioner. Petition ("Pet."), at 2. The affidavit of psychiatrist Leon Yochelson, Petition Appendix ("P.App."), at 34a-42a,

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[1]Hereinafter "Pet. No. 77-259". Concurrently herewith, real parties in interest have moved this Court for leave to refer to the records on file with this Court in, *inter alia, Lee Pharmaceuticals* v. *United States District Court For The Central District Of California, etc.*, No. 77-259, October Term, 1977, dismissed under this Court's Rule 60 on October 31, 1977, ... U.S. ..., 54 L.Ed.2d 295, and in *Lee Pharmaceuticals* v. *Den-Mat, Inc., et al.*, No. 77-244, October Term, 1977, certiorari denied, November 7, 1977, ... U.S. ..., 54 L.Ed.2d 298 (hereinafter "Pet. No. 77-244").

On or about October 3, 1977, real parties in interest in the instant Petition filed in Pet. No. 77-259: (a) a "Memorandum Of Real Parties In Interest In Opposition To Petitioner's Motion To Defer Consideration Of Petition" ("Pet. No. 77-259 Memo."); (b) an "Affidavit Of Arthur L. Martin" ("Pet. No. 77-259 Martin Aff."); and (c) a volume of "Exhibits Referenced In The September 29, 1976 [sic. 1977] Affidavit Of Arthur L. Martin" ("Pet. No. 77-259 Martin Aff. Exhibit Vol.").

> "was filed in the Ninth Circuit *Court of Appeals* on July 15, 1977 *as part of a request for reconsideration* of the July 12, 1977 order [App., at 2a]. A summary denial of reconsideration was entered by that court on July 26, 1977 (App., p. 2a)" Pet., at 14, ¶ 1 (emphasis supplied; footnote omitted).

The respondent District Judge, whose disqualification is sought on the basis of the averments set forth in the affidavit of psychiatrist Yochelson, was never afforded an opportunity to pass upon either the legal or evidentiary[2] sufficiency thereof. *Compare, United States* v. *Gilboy,* 165 F.Supp. 384, 399, n. 26 (M.D. Pa. 1958). Thus, petitioner's second "question" was raised for the first time in the Court of Appeals, upon a request for a *rehearing* following denial of a petition for a writ of mandamus, and is not properly before this Court.

With respect to petitioner's fifth, unreprintable "question" "presented", including its four blasphemous subparts, Pet., at 3, which now and for posterity sully the records of this Honorable Court, petitioner never extended to the District Court an opportunity to rule upon the sufficiency, truth, or falsity of such allegations, and never pointed out to the District Court *any* matter of record which might conceivably support such unsupportable charges of impeachable conduct. Rather, like petitioner's second "question", *supra*, such fifth "question" was "presented" in the first instance to the Court of Appeals. In the premises, real parties respectfully suggest that such fifth "question", too, may not properly be reviewed in this forum.

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[2]See Yochelson Affidavit, ¶¶ 2 and 3 (affiant read petitioner's papers in Ninth Circuit Petition No. 77-1969 *only*), P.App., at 34a, and ¶ 9 ("I have not personally examined Judge Jesse W. Curtis."), P.App., at 36a.

QUESTIONS PRESENTED

1. May a judge's impartiality "reasonably be questioned", pursuant to 28 U.S.C. § 455(a), where he has merely made rulings adverse to a party at some earlier stage in the case?

2. May a litigant move to disqualify his assigned trial judge, pursuant to 28 U.S.C. § 455(a):

(a) only once;

(b) twice;

(c) three times;

(d) four times;

(e) five times (as here); or

(f) an unlimited number of times,

in a single case?

3. Where a judge reasonably believes that a party was acting to disqualify him, and he concluded that such action was contemptuous and reprehensible, but nevertheless calmly controlled his considerable irritation, may such a party reasonably question the judge's impartiality, requiring the latter's disqualification under 28 U.S.C. § 455(a)?

STATUTE INVOLVED

§ 455. Disqualification of justice, judge, magistrate, or referee in bankruptcy

(a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

PROCEEDINGS IN THIS COURT

The instant Petition, No. 77-1073, is the third matter brought to the attention of this Court by petitioner following proceedings before Judge Curtis and the Court of Appeals for the Ninth Circuit.

On or about August 13, 1977, petitioner herein filed Petition No. 77-244. That consolidated matter sought review of decisions of the Court of Appeals denying all relief whatsoever in the latter's

(a) Petition for Mandamus No. 76-3628;

(b) Appeal No. 77-1214;

(c) Appeal No. 77-1215;

(d) Petition for Mandamus No. 77-1539; and

(e) Petition for Mandamus No. 77-2547.

On November 7, 1977, this Court denied the petition for a writ of certiorari in No. 77-244. *Lee Pharmaceuticals* v. *Den-Mat, Inc., et al.*, ... U.S. ....., 54 L.Ed.2d 298.

On August 19, 1977, petitioner herein also filed Petition No. 77-259, seeking disqualification of Judge Curtis pursuant to 28 U.S.C. § 455(a). On or about October 11, 1977, petitioner moved, pursuant to this Court's Rule 60(2), to dismiss Petition No. 77-259. Such Petition was so dismissed on October 31, 1977. *Lee Pharmaceuticals* v. *United States District Court for the Central District of California, etc.*, ... U.S. ....., 54 L.Ed.2d 295.

The instant Petition, No. 77-1073, was filed on or about January 30, 1978. On or about February 1, 1978, petitioner moved this Court for a stay of District Court proceedings. By letter dated February 9, 1978, the Clerk of this Court advised counsel to petitioner, the Clerk of the United

States District Court for the Central District of California, the Solicitor General of the United States, and counsel to real parties in interest, as follows:

"Dear Mr. Irons:

"Your application for stay in the above entitled case [A-649 (77-1073)] has been presented to Mr. Justice Rehnquist, who has endorsed thereon the following:

" 'Denied
2/8/78
WHR'

"Very truly yours,
"MICHAEL RODAK, JR., Clerk
"By

"Peter K. Beck
"Assistant Clerk".

STATEMENT OF THE CASE

Petitioner's description of the underlying nature of this case is confined solely to the opening paragraph of its "Statement Of The Case". Pet., at 5. Although articulated in mock solemnity, a careful reading of such "Statement Of The Case", Pet., at 5–21, leads to a conclusion unique in the annals of Anglo-American jurisprudence: A plaintiff, having invoked the jurisdiction of a court to adjudicate alleged wrongs, has abandoned its claims and, concomitantly, commenced a lawsuit-within-a-lawsuit contesting the right of the judicial system of which such court is an element to adjudicate those claims on the bases of facts, evidence, logic, and precedent, even if adverse to such a plaintiff. More starkly stated, petitioner denies that the Courts of the United States possess jurisdiction to make any findings and render any conclusions adverse to it.

Petitioner's denial of the right of the Federal Judiciary to operate independently of its, and of its counsel's, arbitrary whims, are conclusively established by the following facts:

(a) the need for the assigned trial judge to enter *one hundred three (103)* pretrial orders from commencement of this litigation on July 7, 1975 to the present;

(b) the filing by petitioner, and by its counsel, of no fewer than *one hundred thirty four (134)* pretrial motions from July 7, 1975 to the present, only *thirty one (31)*, or 23.1 percent, of which were granted in their entireties;

(c) the filing by petitioner of no fewer than *thirty four (34)* motions seeking, in whole or in part, to compel, to initiate, or to reinitiate, discovery from real parties

in interest, only *seven (7)*, or 20.6 percent, of which were granted in their entireties[3];

(d) the filing by petitioner of no fewer than *ten (10)* motions whose stated purpose was, or whose practical effect, if granted, would have been, entry of a protective order in favor of petitioner, only *four (4)*, or 40.0 percent, of which have been granted in their entireties;

(e) the filing by petitioner of no fewer than *twenty six (26)* motions whose stated purpose was, or whose practical effect, if granted, would have been, to continue a matter, to "defer" a matter, for an extension of time, for a stay, or for a suspension of proceedings, only *twelve (12)*, or 46.2 percent, of which were granted in their entireties[4];

(f) the filing by petitioner of no fewer than *forty-two (42)* motions which sought to affect one or more previously entered, and lawful, Orders of the District Court[5], or positions previously assumed by it, via one or more of amendment, modification, clarification[6], recon-

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[3]A representative District Court Order denying petitioner's motions for discovery is No. 58, set out in Pet. No. 77-259 Martin Aff. Exhibit Vol., n. 1, *supra*, at Exhibit ("Ex.") N.

[4]A representative District Court Order denying one of petitioner's motions for delay is No. 30, set out in Pet. No. 77-259 Martin Aff. Exhibit Vol., n. 1, *supra*, at Ex. L.

[5]The apparent "rationale" for such attempts to affect prior court orders is set forth in an affidavit of counsel to petitioner, a portion of which is set out in the Opposition Brief of real parties in interest in Pet. No. 77-244, Appendix ("App."), at A1-A2.

[6]A representative District Court Order denying one of petitioner's motions for "clarification" is No. 80, set out in Pet. No. 77-259 Martin Aff. Exhibit Vol., n. 1, *supra*, at Ex. U.

sideration[7], vacation[8], challenge, disagreement[9], or simple disobedience[10], only *one (1)*, or 2.4 percent, of which was granted in its entirety;

(g) the filing by petitioner of *five (5)* motions to disqualify the assigned trial judge, each of which was denied[11];

(h) the filing of an affidavit of petitioner's president, in support of petitioner's second motion to disqualify Judge Curtis, directly charging that jurist with impeachable conduct[12];

(i) the filing by petitioner of a third motion to disqualify Judge Curtis on the basis of his alleged "con-

[7]Representative of District Court Orders denying petitioner's motions for "reconsideration" are No. 49, P.App., at 5a-6a; No. 58, set out in Pet. No. 77-259 Martin Aff. Exhibit Vol., n. 1, *supra*, at Ex. N; the September 14, 1977 bench rulings of the Honorable Martin Pence, United States District Judge for the District of Hawaii, P.App., at 10a-30a; and No. 88, P.App., at 31a. *Compare*, Order No. 81, Judge Curtis' ruling upon one of the few motions for "reconsideration" of real parties in interest, set out in Pet. No. 77-259 Martin Aff. Exhibit Vol., at Ex. V.

[8]A representative District Court Order denying one of petitioner's "vacation" motions is No. 75, set out in Pet. No. 77-259 Martin Aff. Exhibit Vol., n. 1, *supra*, at Ex. T.

[9]A representative District Court Order denying the validity of petitioner's objections to a prior order is No. 84, set out in Pet. No. 77-259 Martin Aff. Exhibit Vol., n. 1, *supra*, at Ex. X.

[10]Exemplars of such disobedience are chronicled in, e.g., the District Court's Order Nos. 43 (4th paragraph), 51 (3rd paragraph), 64, 80 (5th paragraph), and 84, set out Pet. No. 77-259 Martin Aff. Exhibit Vol., n. 1, *supra*, at Ex. D, pp. 7-9; Ex. D, pp. 10-12; Ex. D, pp. 13-14; Ex. U; and Ex. X, respectively.

[11]In Order No. 48, P.App., at 4a; No. 49, P.App., at 5a-6a; No. 73, set out in Pet. No. 77-259 Martin Aff. Exhibit Vol., n. 1, *supra*, at Ex. D, pp. 18-19; No. 88, P.App., at 31a; and in a Minute Order filed February 27, 1978.

[12]"Affidavit of Henry L. Lee, Jr. In Support Of Plaintiff's Renewed And Supplemental Motion To Disqualify Assigned Judge", ¶ 3, Pet. No. 77-259, App., at 9a.

fessed incompetence", which motion was denied as "obviously frivolous"[13];

(j) the filing of an affidavit, in the Court of Appeals for the Ninth Circuit, of a *psychiatrist*[14], in support of petitioner's motion for *reconsideration* of the denial of a petition for mandamus to disqualify the assigned trial judge;

(k) the filing by petitioner of a motion whose practical effect, if granted, would have required Judge Curtis to "eat his own words", which motion was denied[15], and which denial was adhered to[16];

(l) the filing by petitioner of a motion for, *inter alia*,

> "(ii) complete revelation of any and all acquaintanceships or other relationships outside the record between the assigned judge or his clerk or any other members of his staff and any defendant or relative by blood or marriage of an individual defendant"

so as

> "to afford the district judge and his staff an opportunity to demonstrate, *if it can be done*, that the appearance of partiality which is manifest on the present record is without factual foundation" (emphasis supplied),

which motion was denied[17];

[13]See Order No. 73, set out in Pet. No. 77-259 Martin Aff. Exhibit Vol., n. 1, *supra*, at Ex. D, pp. 18-19.

[14]Affidavit of Leon Yochelson, P.App., at 34a-42a.

[15]In Order No. 40, filed February 16, 1977.

[16]In Order No. 51, set out in Pet. No. 77-259 Martin Aff. Exhibit Vol., n. 1, *supra*, at Ex. D, pp. 10-12. Petitioner's *counsel* appealed Order No. 51. In its Order filed November 23, 1977, the Court of Appeals for the Ninth Circuit, in No. 77-2054, ruled that "this appeal is dismissed as it is not taken from an appealable order".

[17]In Order No. 43, set out in Pet. No. 77-259 Martin Aff. Exhibit Vol., n. 1, *supra*, at Ex. D, pp. 7-9.

(m) the filing by petitioner of an "Emergency Application For Writ Of Mandamus and Prohibition" in the Court of Appeals for the Ninth Circuit on August 30, 1977, and therein designated as No. 77-2997,

(1) alleging irregularities in the assignment of judicial duties to the Honorable Martin Pence, United States District Judge for the District of Hawaii; and

(2) further alleging that Judge Pence, appointed pursuant to the "Order Of The Chief Judge", P.App., at 9a:

(A) was "[in]capable of being coldly objective toward and detached from Judge Curtis' conduct";

(B) "will not effectively deal with Judge Curtis[']biased and partial conduct";

(C) was obligated to "issue what can only be a rubber stamp verdict"; and

(D) was further obligated to "render a futile decision designed to insure that Judge Curtis is not embarrassed by his tenacious refusal in direct derogation of his judicial oath and duty"[18];

(n) the filing by petitioner of a motion to disqualify counsel to real parties in interest, which was denied[19];

(o) the filing by petitioner of a motion to release from constraints of protective orders entered by the District

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[18]The quoted language appears over the signature, Ninth Circuit Petition No. 77-2997, at 21, of Mary Helen Sears, Esq., a member of the Bar of this Court. Petition No. 77-2997 was denied by the Court of Appeals on September 1, 1977, a mere *two* days following its filing.

[19]In Order No. 89, filed November 9, 1977. Petitioner noticed an appeal from Order No. 89 on November 17, 1977, which has yet to be docketed in the Court of Appeals for the Ninth Circuit. Counsel to petitioner have previously attempted, unsuccessfully, to disqualify opposing counsel in another case. *Ceramco* v. *Lee Pharmaceuticals*, 510 F.2d 268 (2d Cir. 1975).

Court of two affidavits executed by counsel to real parties in interest concerning his clients' proprietary information, so as to allow submission of such affidavits to the State Bar of California in support, apparently, of a proposed grievance charging such counsel with unethical conduct[20];

(p) the filing by petitioner, in the Court of Appeals for the Ninth Circuit, of *six (6)* interlocutory petitions for mandamus[21], each of which, including the one[22] from which the instant Petition arises, was denied without comment;

(q) the filing by petitioner, in the Court of Appeals for the Ninth Circuit, of *two (2)* interlocutory appeals[23], each of which was dismissed without comment for lack of jurisdiction;

(r) the filing by *counsel to petitioner* of *two (2)* interlocutory appeals from District Court Order Nos. 41[24] and 51[25], the latter appeal having been "dismissed as it

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[20]*Compare*, Rule 7-104, Rules of Professional Conduct Of The State Bar of California, to which counsel to petitioner are subject by virtue of Local Rule 1.3(d) of the United States District Court for the Central District of California. The motion to release the "Restricted Information" status of such affidavits was denied by Judge Curtis at a hearing held on February 27, 1978, because, the District Court found, the motion had been filed "in bad faith".

[21]Ninth Circuit Petition No. 76-3028, filed December 17, 1976; No. 77-1539, filed March 11, 1977; No. 77-1969, filed May 6, 1977; No. 77-2547, filed July 15, 1977; No. 77-2997, filed August 30, 1977; and No. 77-3361, filed October 11, 1977.

[22]Ninth Circuit Petition No. 77-3361.

[23]Ninth Circuit Appeal Nos. 77-1214 and 77-1215, both docketed January 31, 1977.

[24]Set out in Pet. No. 77-259 Martin Aff. Exhibit Vol., n. 1, *supra*, at Ex. D, pp. 5-6. This appeal was docketed in the Court of Appeals for the Ninth Circuit as No. 77-1984 on May 3, 1977.

[25]Set out in Pet. No. 77-259 Martin Aff. Exhibit Vol., n. 1, *supra*, at Ex. D. pp. 10-12. This appeal was docketed in the Court of Appeals for the Ninth Circuit as No. 77-2054 on May 11, 1977.

is not taken from an appealable order" on November 23, 1977, the former appeal remaining *sub judice*;

(s) petitioner's noticing of *two (2)* additional appeals, from the District Court's Order No. 87, filed October 21, 1977, dismissing petitioner's application for a preliminary injunction on trademark infringement, trade secret misappropriation, and unfair competition issues, and from Order No. 89, filed November 9, 1977, denying petitioner's motion to disqualify counsel to real parties in interest;

(t) petitioner's bringing to the attention of the Court of Appeals for the Ninth Circuit:

(1) on *seven (7)* separate occasions, the alleged infirmities of the District Court's Order No. 28[26];

(2) on *six (6)* separate occasions, the alleged infirmities of the District Court's Order No. 24, filed November 1, 1976;

(3) on *four (4)* separate occasions, the alleged infirmities of each of the District Court's Order Nos. 17 and 21, each filed October 27, 1976; No. 30[27], filed December 6, 1976; Nos. 40, 41[28], and 43[29], each filed February 16, 1977; and No. 59[30], filed April 25, 1977;

(4) on *three (3)* separate occasions, the alleged infirmities of each of the District Court's Order No. 45[31], filed February 17, 1977; and No. 51[32], filed March 29, 1977; and

[26]See Pet. No. 77-259 Martin Aff. Exhibit Vol., n. 1, *supra*, at Ex. K.
[27]*Ibid.*, at Ex. L.
[28]*Ibid.*, at Ex. D, pp. 5-6.
[29]*Ibid.*, at Ex. D. pp. 7-9.
[30]*Ibid.*, at Ex. O.
[31]*Ibid.*, at Ex. M.
[32]*Ibid.*, at Ex. D. pp. 10-12.

(5) on *two (2)* separate occasions, the alleged infirmities of each of the District Court's Order No. 26, filed November 2, 1976; No. 33, filed December 6, 1976; No. 48 (P.App., at 4a); No. 49 (P.App., at 5a-6a); No. 53, filed April 22, 1977; No. 60[33], filed May 3, 1977; No. 72[34], filed May 26, 1977; No. 84[35], filed August 16, 1977; the "Memorandum to Chief Judge Stephens" (P.App., at 7a-8a); and the "Order Of The Chief Judge" (P.App., at 9a),

upon the beliefs (i) that the court below was unable or unwilling to grasp the quintessence of such infirmities on the first pass; (ii) that a different panel of the Court of Appeal might be unaware of a previous review of a particular District Court Order; or (iii) a combination of each of the foregoing;

(u) petitioner's litigation before *this* Court, in Petition No. 77-244, *cert. denied,* ..... U.S. ....., 54 L.Ed.2d 298, of the power of two-judge panels of the Court of Appeals for the Ninth Circuit, in the absence of disagreement between members of such panel, to hear and determine cases and controversies consistent with the requirements of 28 U.S.C. §§ 46(b)–(d);

(v) petitioner's apparent present contention, Pet., at 29, that this Court's denial of certiorari in *Amalgamated Sugar Co.* v. *United States District Court for the Northern District of California,* No. 77-4, ... U.S. ....., 54 L.Ed. 2d 125, was incorrect, and that the identical issues raised in that and in this Petition should be relitigated, *now,* with this Petition functioning as an appropriate vehicle

[33]*Ibid.*, at Ex. P.
[34]*Ibid.*, at Ex. S.
[35]*Ibid.*, at Ex. X.

for this Court's "reconsideration" of its decision in No. 77-4[36]; and

(w) the noticing, by present *counsel to petitioner*, on February 28, 1978, of an appeal from the District Court's Order No. 98, filed the previous day, which denied petitioner's motion to vacate an Order of Reference to a Special Master of specifically designated trade secret issues, petitioner's *eight (8)* purported objections to the Order of Reference being variously characterized by Judge Curtis as:

(1) "obviously without merit and frivolous";

(2) "[i]t is inconceivable that plaintiff with this background [of specifically identified orders of the District Court] can make this objection in good faith";

(3) "also contrived";

(4) "likewise frivolous" and "meaningless";

(5) "impertinent in the extreme and . . . therefore stricken"[37]; and

(6) "being made in jest",

such Order No. 98 concluding:

"No[t] only is this motion completely without arguable support, it is vexatious, impertinent, and the very quintessence of bad faith. Not only should it be denied, but sanctions must be imposed.

"IT IS THEREFORE ORDERED that plaintiff's motion to vacate Order No. 94 is denied and,

[36]*See* nn. 5-9, *supra*, and accompanying text.

[37]With respect to petitioner's "reasserting its belief that this court 'has acted without detached impartiality,' [and] that it has imparted this lack of impartiality and prejudice to the special master by verbal communications."

"The court finds that plaintiff's motion to vacate Order No. 94 filed by the firm of Irons & Sears has so multiplied the proceedings in this case as to increase the costs unreasonably and vexatiously, accordingly, pursuant to Title 28 U.S.C. § 1927,

"IT IS HEREBY ORDERED that the firm of Irons & Sears shall pay to defendants' counsel the sum of $500.00 within twenty-one (21) days from the date hereof."[38]

Despite:

(a) "a maneuver on the part of the plaintiff to further delay the progress of the lawsuit"[39]

(b) the District Court's "opinion [that] the petition for writ of mandamus [Ninth Circuit No. 76-3628] is without cause to stay any proceedings, and has been

[38]On March 1, 1978, one day following the filing of their notice of appeal, *counsel to petitioner* filed a motion "That All Copies Of Order No. 98 And February 27, 1978 Hearing Transcript Be Placed Under Seal . . . ", and seeking an order, *inter alia*, to the effect that

"(2) No copies of Order No. 98 or the February 27, 1978 hearing transcript and no information concerning the content of either shall be disseminated, published or disclosed in any manner to a third party, *except as a part of and in the course of proceedings that may ensue before a higher court having jurisdiction to review this court's activities* . . . . " (emphasis supplied).

With slack-jawed disbelief, real parties in interest noted the following naked *threat* to a United States District Judge in the "memorandum" in support of the motion of petitioner's counsel to seal:

"It is not the desire of plaintiff's counsel to prolong the unpleasantness of this litigation by resort to further actions, including actions for libel and slander or related relief."

Instead of paying the $500 and being done with it, petitioner's counsel, on March 2, 1978, noticed an *ex parte* hearing for March 6, 1978, at 2:30 p.m., for the purposes of obtaining a stay of Order No. 98 and of the setting of a supersedeas bond.

[39]Order No. 30, Pet. No. 77-259 Martin Aff. Exhibit Vol., n. 1, *supra*, at Ex. L, p. 2, ¶ 4.

filed for the purpose of further delaying the trial of this lawsuit"[40];

(c) the District Court's "view" that "the filing of such a motion ["for full disclosure of all off-the-record communications between court personnel and defendants, their representatives and counsel"] under the circumstances is contemptuous. Beyond that it is frivolous and impertinent"[41];

(d) the fact that petitioner's counsel "has become angry with this court because of a series of adverse rulings which have apparently frustrated her litigation strategy", P.App., at 4a;

(e) the fact that "[p]laintiff's motion is totally improper and a flagrant violation of Local Rule 3(k). This court has already imposed sanction[s] upon plaintiff's counsel for two prior violations of this rule"[42];

(f) "plaintiff's litigious propensities as clearly demonstrated by the history of this lawsuit"[43];

(g) "this [District] court's view . . . [that Ninth Circuit] appeal [No. 77-1984] is frivolous and . . . has been filed for the purpose of thwarting this court's efforts to move this case toward its ultimate determination with a minimum of delays and unnecessary pretrial procedures"[44];

(h) the fact that "[i]t is only unusual circumstances that this [District] court would deny a party the right

[40]Order No. 42, filed February 16, 1977, at ¶ 7.
[41]Order No. 43, Pet. No. 77-259 Martin Aff. Exhibit Vol., n. 1, *supra*, at Ex. D, p. 8.
[42]Order No. 58, *Ibid.*, at Ex. N.
[43]Order No. 69, Ibid., at Ex. D, p. 16.
[44]*Ibid.*

to be heard orally on motions of this kind. There are, however, unusual circumstances in this case. In this court's view, this motion [to vacate Order No. 72] has been filed for the sole purpose of disrupting this court's efforts to move this case along toward some ultimate conclusion"[45]; and

(i) the fact that "plaintiff ["for nearly fifteen months"] thus far has thwarted every effort of the court to obtain" an identification of "what trade secrets it asserts are being misappropriated"[46],

real parties in interest, *on the merits,* have managed to effect the dismissal of petitioner's application for a preliminary injunction with respect to trademark infringement, trade secret misappropriation, and unfair competition, and have filed two motions for partial summary judgment with respect to such issues. A third motion for partial summary judgment, with respect to patent invalidity and lack of infringement, remains in preparation.

The labor required to give birth to the instant Petition—the *sole* offspring produced by petitioner and its counsel after nearly two years and eight months of white-lipped straining—has required the obstetrical knowledge of two United States District Judges, the Chief Judge of a United States District Court, and their collective issuance of *one hundred five (105)* orders. Furthermore, because of the breach posture of the instant fetus-Petition, at least *twelve (12)* United States Circuit and Senior Circuit Judges have warned petitioner on no fewer than *twenty (20)* occasions,

[45]Order No. 75, Pet. No. 77-259 Martin Aff. Exhibit Vol., n. 1, *supra*, at Ex. T, p. 2.
[46]Order No. 80, Ibid., at Ex. U, at p. 1.

by *their* collective orders, that the probability of a stillbirth was not less than 100 percent.[47]

The instant Petition must rank as one of the most, if not *the* most, scurrilous document ever filed in an English-speaking court, which real parties will shortly seek to strike as violative of this Court's Rule 40(5), and which, remarkably, is the *fourth* Petition[48] filed in this Court by present counsel to petitioner in the four Terms last past seeking to disqualify a United States District Judge before whom one or both of such counsel were appearing.

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[47]Participation by Circuit and Senior Circuit Judges in Orders of the Court of Appeals for the Ninth Circuit reviewing the rulings of Judge Curtis were as follows: Hon. James R. Browning, Chief Judge—two orders; Hon. Richard H. Chambers—two orders; Hon. Herbert Y. C. Choy—six orders; Hon. Ben Cushing Duniway—one order; Hon. Walter Ely—two orders; Hon. Alfred T. Goodwin—one order; Hon. Shirley M. Hufstedler—two orders; Hon. Proctor Hug, Jr.—one order; Hon. Anthony M. Kennedy— one order; Hon. Joseph T. Sneed—one order; Hon. Ozell M. Trask—five orders; Hon. J. Clifford Wallace—six orders; and the Ninth Circuit's "*active bench*"—one order.

[48]The instant Petition, No. 77-1073; the immediate precursor thereto, No. 77-259; *Irons* v. *Gottschalk*, 548 F.2d 992, 993-994 (D.C. Cir. 1976) (Mr. Justice Clark), *cert. denied sub nom. Irons* v. *Parker* (No. 77-203), ... U.S. ..., 54 L.Ed.2d 451 (November 28, 1977); and *Irons* v. *Dann* (No. 74-620), *cert. denied*, 420 U.S. 946 (1975).

ARGUMENT

1. Public Confidence In The Federal Judicial System Would Be Weakened, Not Strengthened, Should This Court Review (a) The Refusal Of Judge Curtis To Disqualify Himself, And (b) Affirmance Of The Correctness Of That Jurist's Decision By The Court Of Appeals.

The "strongest" argument advanced by petitioner for granting of the writ is articulated as follows:

> "In part, the sabotage of Congressional intent that is effectively occurring in the lower federal courts *may* result from the failure of Congress to specify what procedure is to be utilized, *including who shall determine the issue* of 'whether his impartiality might reasonably be questioned' *and what evidence is to be considered....*" Pet., at 22 (emphasis supplied).

While that argument may be persuasive in other cases, it starkly does not fit the facts of the instant Petition. Initially, the plain fact is that there has occurred an independent review of the assigned trial judge's "impartiality", and whether the same "might be reasonably be questioned"—by Judge Pence. P.App., at 10a-30a. Secondly, the legislative history of the 1974 amendments to 28 U.S.C. § 455(a) may be searched in vain for even one scintilla of debate—or Committee findings—that Congress intended that the affidavit of a psychiatrist—*and a psychiatrist who has not examined the challenged judge and who has only read papers presented to him by an interested litigant*—is, or can be, evidence on the issue of "impartiality". Significantly, petitioner points to no case authority, nor has the research of real parties uncovered any, sustaining the evidentiary worth of such an affidavit in judicial disqualification proceedings.

Should this Court grant certiorari:

(a) the citizenry would be appalled and flabbergasted to learn of the massive judicial personpower which unstintingly has been poured into this case to bring it to its present posture[49];

(b) disappointed citizen litigants, and their disappointed counsel, would take heart and emulate the conduct of petitioner, and of its counsel, herein, further diluting the perpetually slim resources of an already overworked Federal Judiciary; and

(c) the conduct complained of by the trial judge in *In Re Union Leader Corp.*, 292 F.2d 381 (1st Cir. 1961), *cert. denied,* 368 U.S. 927 (1961), namely:

> "It is true that your client has been in the business of attacking me, but I haven't attacked your client. And I regard his misconduct as giving no basis for alleging misconduct on my part", 381 F.2d, at 388,

would be directly and proximately sanctioned.

Petitioner's "public confidence" argument—in the factual setting of this case—leads to a conclusion exactly contrary to that advanced by petitioner.

2. The Remaining Arguments Advanced By Petitioner In Support Of Granting The Writ Have Been Considered Recently By The Court And Found Unworthy Of Review.

Petitioner contends, Pet., at 25-29, that the decision below conflicts with decisions from other lower federal courts, and further, *Ibid.*, at 29-30, that the Court Of Appeals For The Ninth Circuit has exhibited a disinclination to use the

[49]See n. 47, *supra* and accompanying text.

writ of mandamus to correct judicial abuses. Each of these issues was recently considered by this Court in *Amalgamated Sugar Co.* v. *United States District Court For The Northern District Of California,* No. 77-4, *cert. denied,* ..... U.S. ....., 54 L.Ed.2d 125 (October 31, 1977). Not yet in this Court's Official Reports, petitioner is simply asking this Court to "reconsider" its denial of the Writ in that case. *Compare,* notes 5-9, and accompanying text, *supra,* at 9-10.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Dated: March 6, 1978

Respectfully submitted,

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IN THE

Supreme Court of the United States

No. 77-1073

LEE PHARMACEUTICALS,
Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,
Respondent.

DEN-MAT, INC., ROBERT IBSEN, W. RICHARD GLACE, FRED H. BROCK AND PROFESSIONAL PRODUCTS CO.,
Real Parties In Interest.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

Supreme Court of the United States

No. 77-1073

LEE PHARMACEUTICALS,
Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,
Respondent.

DEN-MAT, INC., ROBERT IBSEN, W. RICHARD GLACE, FRED H. BROCK AND PROFESSIONAL PRODUCTS CO.,
Real Parties In Interest.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Viewed as a whole and in context, all papers before this Court on this petition depict a typical, albeit perhaps aggravated, example of the kind of trial judge conduct which has contributed to bringing the judicial system into its current state of public repute—probably the lowest in American history. At the core of this crisis in

public confidence lies the broad issue of whether judges *must* appear to strive to effect justice in an evenhanded manner, as 28 U.S.C. § 455(a) in terms requires, or whether they may succumb to the temptations of petty tyranny and allow themselves to appear arbitrary, malicious and personally involved in the cases they handle. Prompt resolution of this broad issue is focal to whether the lofty claim that this society venerates and pursues as its goal the rule of law, not men, will even survive the present generation. Any continued toleration of unrestrainedly aberrant judicial conduct, however rationalized, by failing to curb, and thereby fueling, its ever burgeoning incidence, will only propel current public dissatisfaction with the judiciary into public rebellion against the rule of law itself—a dire prospect indeed.

The so-called "real parties in interest"—defendants in the district court—effectively concede the overwhelming public importance of the questions presented at Pet. 2-4 [1]

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[1] Challenge is purportedly made to this Court's "jurisdiction" (R.P. Br. 2-3) to review the questions but on bases so ephemeral as to require no real discussion. Thus,

a) It is specious even to suggest that petitioner's own all-too-prophetic assertion in No: 77-259, that the "review" by a fellow district judge, which Judge Curtis sought on July 20, 1977 (App. 7a-8a), of his own prior Order 48 (App. 4a) and 49 (App. 5a-6a) refusing to disqualify himself, "can never result in any action of any meaningful nature" (R.P. Br. 2) *could* deprive this Court of "jurisdiction" to review the decision that Judge Pence rendered pursuant to such procedure.

b) The assertion that Judge Curtis never had an opportunity to rule upon "the legal or evidentiary sufficiency" (R.P. Br. 3) of the affidavit of Dr. Leon Yochelson, a qualified psychiatrist (App. 34a-42a), is inconsistent with the necessarily acknowledged *fact* that Judge Curtis *did* evaluate the affidavit, as reflected by his own "Memorandum to Chief Judge Stephens" (App. 7a-8a) which avowedly sets forth the result of that evaluation.

c) Defendants' bald assertion that the fifth question (Pet. 3) was not before Judge Curtis attempts to exploit the unavailability to this Court of the totality of the record below, and to play upon the fact that the question was not presented elsewhere *in haec verba*. The whole record below shows that this question fairly summarizes all the substantive bases on which petitioner has continuously asked Judge Curtis to disqualify himself from February 1977 to the present, *all* of which were also presented to Judge Pence on September 14, 1977.

and the correctness of the "Statement of the Case" appearing at Pet. 5-20. Considered in context of the whole case as thus revealed, the "real parties' " brief is *per se* eloquent testimony to the inevitability of extinction of public confidence in the judicial system and in the integrity and fairness of the judicial process if district court conduct such as that here questioned not only continues to be tolerated, but remains unreviewable until after all issues of a pending suit have been disposed of on their merits by a judge whose demeanor proclaims his partiality.

"Real parties' " efforts at statistical analysis of the record below and their various acknowledgements of its sorry posture, even though far less than faithful to the totality of the *actual* record—and hence in furtherance of a pervasive attempt to exploit the unavailability of the whole record here [2]—unwittingly reveal clearly that:

1. Contrary to the implication of "real parties' " spurious question 1 (R.P.Br. 4), petitioner's 28 U.S.C. 455 (a) challenge to Judge Curtis was *not* advanced because

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[2] This attempted exploitation is severely aggravated by attempted reliance at R.P. Br. 2 and 9-19 inclusive, on a testimonial affidavit of Arthur Martin filed in No. 77-259 in this Court, and its various exhibits. The exhibits are objected to because they afford a fragmentary and distorted, *untrue* picture of the whole record below and moreover, are not at all necessary to an understanding of the "questions presented" at Pet. 2-4.

Petitioner also objects strongly to any consideration of this Martin affidavit *per se* for any purpose because it constitutes noncognizable testimony of opposing *counsel*, violative of DR 5-101(B) and 5-102 of the Code of Professional Responsibility and hence is incompetent.

"he . . . merely made rulings adverse to" (*ibid.*) petitioner but, rather, because the demeanor of the rulings, among which Order No. 98 (R.P.Br. 16) is exemplary, is hostile to plaintiff and its counsel to an extreme. See also R.P.Br. 17-19.

2. Contrary to the implication of "real parties'" equally spurious question 3 (R.P.Br. 4), Judge Curtis has not "calmly controlled his considerable irritation" (*ibid.*). See R.P.Br. 16-19. Rather—and conversely to the facts in *In re Union Leader Corp.*, 292 F.2d 381 (1 Cir. 1961) cited at R.P.Br. 22—Judge Curtis "has been in the business of attacking" petitioner and its counsel, *ad hominem* and unrestrainedly. In particular, Judge Curtis has taken the position, in substance, that petitioner and its counsel, by respectfully disagreeing with him based on the law itself, is guilty of bad faith and frivolity —hardly a judicial attitude. Petitioner and its counsel have never "attacked" the judge or resorted to "threats" or name calling, but have simply properly endeavored to use every reasonable available avenue of seeking appellate review and to preserve every reasonable objection that the law affords, because this is necessary to petitioner's welfare.

3. The continuing uninhibited airing of Judge Curtis' venom against petitioner and its counsel has left the petitioner with no choice but to augment its previous disqualification motions as new incidents indicative of partiality occur, lest it later be said that reliance on these new incidents was waived. *Cf.* "real parties'" captious question 2 at R.P.Br. 4.

4. The presentation in this Court only short months ago of the petition in the No. 77-4 simply underscores (i) the rapidity with which public confidence in the judicial system continues to crumble, (ii) the severity of the particular Ninth Circuit problems raised by the petition, and (iii) the need to resolve them *now*. For example,

reported decisions of major, conflicting cases relating to the interpretation of 28 U.S.C. 455(a) from other circuits have grown by three since the petition in No. 77-4 was filed—viz. *United States* v. *Bray*, 546 F.2d 851 (10 Cir. 1977), *Webb* v. *McGhie Land Title Co.*, 549 F.2d 1358 (10 Cir. 1977) and *SCA Services* v. *Morgan*, 557 F.2d 110 (7 Cir. 1977), all cited at Pet. 25.

5. "Real parties'" *only* reason for opposing review in this case rests on their selfish and desperate desire to preserve the unfair advantage that accrues to them so long as Judge Curtis continues to sit. Were it otherwise, *even they* must blush at such unsupportable emotional extravagances as, e.g.,

a) the false and ludicrous assertion that petitioner "has abandoned its claims" on the merits below (R.P. Br. 8);

b) the not only false but plain silly statement that "petitioner denies that the Courts of the United States possess jurisdiction to make any findings and render any conclusions adverse to it" (R.P.Br. 8);

c) the misrepresentation by omission in subparagraph (1), R.P.Br. 11 which carefully conceals that the motion in question primarily sought a full revelation of all facts relating to Judge Curtis' direct and indirect *ex parte* contacts with "real parties";

d) the outright falsehood that petitioner's president by affidavit "directly charg[ed] . . . [Judge Curtis] with impeachable conduct" (R.P.Br. 10);

e) the significant omission of the fact of continued pendency of a petition for rehearing *in banc* in Ninth Circuit Appeal No. 77-2054, referred to in note 16 at R.P.Br. 11 and again at R.P.Br. 13-14, as "dismissed";

f) the prevarication that "real parties'" counsel's two challenged testimonial affidavits filed in deroga-

tion of Disciplinary Rules 5-101(B) and 5-102 of the Code of Professional Responsibility both deal with "his clients' proprietary information" (R.P.Br. 13) when in fact, in one of them counsel Martin purports to testify on the merits as to the alleged non-protectability of *petitioner's* trade secrets in issue;

g) the related concealment of the fact that the "motion to disqualify counsel to real parties in interest" (R.P.Br. 12) was grounded on these same two unethical testimonial affidavits;[a]

h) the egregious misrepresentation in subparagraph (t) at R.P.Br. 14-15 flatly attributing "beliefs" (*id.* at 15) to petitioner and its counsel which they have *at no time* espoused;

i) the falsehood that plaintiff's counsel made a "naked threat to a United States District Judge" (R.P.Br. 17 n.38) of a libel and slander suit when "real parties" well know—and the relevant memorandum *in context* shows—that the quoted portion

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[a] Significantly, the reason that Judge Curtis gave for refusing to permit transmission of the two unethical affidavits to the grievance committee only was "I might lose control of some of these matters which have been submitted here under certain restraints, and I am not going to release them and they are not necessary anywhere." (February 27, 1978 transcript, p.5 ll. 2-4) and *not*, as falsely stated by "real parties" in note 20, R.P. Br. 13 that "the motion had been filed in 'bad faith' ".

The whole incident is especially revealing of the apparent partiality of Judge Curtis when contrasted with his refusal to prevent a slanderous public dissemination by "real parties" of Order No. 98, various epithets from which are quoted at R.P. Br. 16.

Thus, unethical testimonial affidavits by *defendants'* counsel may not even be viewed *in camera* by the grievance committee; yet the judge's own incorrect fact findings against *plaintiff's* counsel are publicly available despite the pendency of appellate review, clearly available under the "collateral order" doctrine.

of the memorandum was *not at all* directed to the judge, but rather to "real parties" themselves;

j) the deliberate republication, with an erroneous implication of versimilitude, of the factually inaccurate findings by Judge Curtis (pars. (a) to (i) at R.P.Br. 17-19) which are slanderous, libelous or both in defendants' mouths and which symptomize irrefutably the malice that Judge Curtis bears the plaintiff and its counsel in derogation of 28 U.S.C. 455 (a);

k) the false charge, refuted by the whole record below, that petitioner has made no effort to advance the case below on the merits except by this petition (R.P.Br. 19-20);

l) the misrepresentation (R.P.Br. 20) that Nos. 74-620 and 77-203, neither of which involved either this petitioner or any facet of the interpretation of 28 U.S.C. 455(a), are or could be related to this petition;

m) the misrepresentations at R.P.Br. 21 that

(i) Judge Pence rendered an "independent review" as to whether Judge Curtis appears to be partial in derogation of 28 U.S.C. 455(a), when the record shows that Orders 48 (App. 4a) and 49 (App 5a-6a) were *not* first vacated, so that the possibility of "independent review" by a coordinate district judge was hence foreclosed;

(ii) the Court of Appeals *affirmed* on their merits, the refusals of disqualification in the district court, whereas General Order No. 4 of the Ninth Circuit holds summary denial of manda-

mus "shall not be regarded as a decision on the merits" (App. 70a).[4]

The very resort to these excesses is a tacit confession that "real parties" *know* review is desirable—even needed—and can make no *honest* arguments against grant of the writ.

CONCLUSION

In the interests of the public as a whole, the questions raised by this petition should promptly be answered. Grant of the writ as asked is accordingly requested.

Respectfully submitted,

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[4] Because these *were* summary denials, the use of so-called appellate "judicial personpower" (R.P. Br. 22; See also R.P. Br. 20, n.47) was manifestly minimal, and *may* well have involved little more than signing or initialling dismissal orders.